

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-1334

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 74-1334

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

against

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, et al.,

Defendants.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

LEGAL ACTION CENTER OF THE CITY
OF NEW YORK

Attorneys for Plaintiffs-Appellees
Boston M. Chance et al.
271 Madison Avenue
New York, New York 10016
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FRANKLE & GREENWALD

Attorneys for Intervenor-Appellant
Council of Supervisors & Adminis-
trators, Local 1, SASOC, AFL-CIO
80 Eighth Avenue
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PAGINATION AS IN ORIGINAL COPY

APPENDIX

TABLE OF CONTENTS

| <u>Document</u> | <u>Page</u> |
|---|-------------|
| Docket Entries | 1a |
| Letter of Elizabeth B. DuBois, Esq., dated November 15, 1973 | 12a |
| Letter of Leonard Bernikow, Esq., dated November 16, 1973 | 15a |
| Letter of Leonard Greenwald, Esq., dated November 26, 1973 | 19a |
| Letter of Joseph P. Flemming, Esq., dated November 27, 1973 | 27a |
| Letter of Elizabeth B. DuBois, Esq., dated November 27, 1973 | 40a |
| Letter of Leonard Greenwald, Esq., dated November 29, 1973. | 50a |
| Letter of Leonard Bernikow, Esq., dated December 3, 1973 | 53a |
| Letter of Leonard Greenwald, Esq., dated December 28, 1973 | 56a |
| Order (Tyler, D.J.) filed on January 21, 1974 . . | 58a |
| Letter of Joseph P. Flemming, Esq., dated February 4, 1974 | 59a |
| Letter of Leonard Greenwald, Esq., dated February 8, 1974 | 63a |
| Opinion (Tyler, D.J.) filed on February 25, 1974. | 65a |
| Order (Tyler, D.J.) filed on March 12, 1974 . . . | 67a |
| Order (United States Court of Appeals (Second Circuit) filed on March 18, 1974 | 69a |

Docket Entries

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

7C CIV. 4141.

C. Form No. 106 Rev.

JUDGE

TITLE OF CASE

CLASS ACTION

ATTORNEYS

BOSTON M. CHANCE
and LOUIS C. MERCADO, individually
on behalf of all others similarly
situated,

v.

THE BOARD OF EXAMINERS AND THE
BOARD OF EDUCATION OF THE CITY OF
NEW YORK:

GEORGE E. UNSER, individually and
in her capacity as Chairman of the
Board of Examiners;

SAUER, GREENE, MURRAY ROCKAWITZ and
PAUL DENN, individually and in their
capacities as members of the Board
of Examiners;

MURRAY FURGTRAUM, individually and in
his capacity as President of the
Board of Education;

LESTER E. ROBINSON, JR., individually
and in his capacity as Vice-President
of the Board of Education;

MAURICE MEADE, SEYMOUR P. LACHMAN, and
JOSEPH MONSENAT, individually and in
their capacities as members of the Board
of Education;

HARVEY D. SCRIBNER, individually and in
his capacity as Chancellor of the City
School District of the City of New York;
and THEODORE H. LANG, individually and
in his capacity as Deputy Superintendent
of Schools of the City of New York.

For plaintiff:

JACK GREENBERG, JONATHAN SHAPIRO
10 Columbus Circle,
N.Y.C.N.Y. 10019--

Elizabeth S. Dubois
Legal Action Center of the
City of NY
271 Madison Ave. NYC10016 679-6574

For defendant:

Leonard Bernick
Bd. of Education: Adrienne Butler
J. Lee Rankin - / / / / /
Corporation Counsel - City of New York
Municipal Building
New York, NY 10007

Bd. of Examiners: ✓
Kaye, Scholer, Fierman, Hays & Handler
425 Park Ave. PL 9-8400
New York, NY 10022

Frankle & Greenwald
80 Eighth Ave. NYC10011 242-0200
(USA Local L.SACOG, AFL-CIO)

| STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|---|-------------|---------|---------------------|------|-------|
| J.S. 5 mailed x | Clerk | 9/24/70 | J. GREENBERG | 15 | - |
| | | 9/25/70 | 15 TAES | 15 | - |
| | | 11/2/73 | Weiner | 5 | - |
| | | 1/1/73 | MEAS | 5 | - |
| | | 1/10/73 | N. Deutch | 5 | - |
| | | 8/14/73 | 1ST rec. | 5 | - |
| | | 1/2/73 | Weiner | 5 | - |
| | | 1/4/73 | MEAS | 5 | - |
| Basis of Action: Violation CIVIL RIGHTS. | Docket fee | | | | |
| Action arose at: | Depositions | | | | |

JUDGE WYLIE

JUDGE WYLIE

Pa
70 (IV. 414)

JUDGE WYLIE

PROCEEDINGS

Date Order or
Judgment Noted

5/24/70 Filed Complaint and issued summons.

5/24/70 Filed pltf's Notice of Motion. Re; Prel. Inj. Ret. 10-6-70

5/24/70 Filed Request and Order designating Ann Wagner to serve summons and complaint.

So ordered. Clerk.

5/24/70 Filed summons - copies accepted.

5/25/70 Filed Order to Show Cause re: Intervene Ret. 10-6-70.

5/26/70 Filed Amended Complaint. (1a. D. 51. 14. K.)

5/26/70 Filed Affidavit of Arnold Webb and Exhibit, in support of motion for pre-inj.

5/26/70 Filed Supplemental Memorandum of Points and Authorities in support of motion for pre-inj.

5/27/70 Filed C.R.P. #37016. Hansfield, J. The motion to intervene is denied.

It is so ordered. (mailed notice)

5/27/70 Filed Order that pending the determination of this motion, the depts are restrained from promulgating or otherwise publishing any new eligible lists for supervisory service positions in the New York City school system as indicated. Hansfield J. -mailed notice.

5/29/70 Filed Notice of Motion re: Allow Class Action. Ret. 12/29/70.

5/29/70 Filed Memorandum of Points and Authorities in support of pltf's, motion to allow class action.

5/30/70 Filed Notice of Settlement and Order. Ordered that The Board of Examiners shall prepare two lists of the candidates for the supervisory examinations listed on Exhibit A, etc. and a copy of the name and address list shall be served by hand upon counsel for the Board of Education, etc. Information concerning the ethnicity of individuals obtained pur. to this order is to be used solely for the purpose of tabulating the pass-fail statistics requested by the Court in the present action, etc. So ordered. Hansfield, J. (mailed notice).

5/31/70 Filed 3 Envelopes ordered to be sealed and impounded pur. to order of 12/30/70 and placed in Vault Room 602.

5/31/70 (2) Fld. Portfolios containing Affidavit of Harold Siegel, with lists of names, addresses, and present school or office location and position of individuals currently employed in the New York School System.

5/31/70 Filed Affidavit containing the ethnicity of the individuals in the School System.

5/31/70 Filed Affidavit containing the ethnicity of the individuals listed in the School System, with envelope attached containing the list.

5/31/70 Filed Affidavit containing the ethnicity of the individuals listed, with envelope attached containing list, by Siron S. Silverman.

5/31/70 Filed Affidavit of Arthur Clinton re: the ethnicity of the individuals listed in the list contained in the envelope attached.

5/31/70 Filed one envelope containing list of ethnicity of individuals (no affidavit).

5/31/70 Filed one envelope containing ethnicity list of individuals, and affidavit of Eddie Lester.

5/31/70 Filed one envelope containing ethnicity list of individuals, and affidavit of Heinrich Wollin.

5/31/70 Filed one envelope containing affidavit of Josephine S. O'Brien and list of ethnicity of individuals. (Impounded in Vault Room 602).

5/31/70 Filed photoopies of the returned affidavits to counsel for the respective parties.

5/31/70 Filed envelope containing affidavit of Iyan Boland and list of ethnicity of individuals. (Impounded in Vault Room 602).

5/31/70 Filed envelope containing affidavit of Juliet Sanders and list of ethnicity of individuals. (Impounded in Vault Room 602).

5/31/70 Filed envelope containing affidavit of Dr. Lurie B. Meyers and list of ethnicity of individuals. (Impounded in Vault Room 602).

continued next page

JUDGE TYLER

C. 110 Rev. Civil Docket Co.

PROCEEDINGS

| DATE | PROCEEDINGS |
|-----------|--|
| Jan 22-71 | Filed One envelope containing list of ethnicity of individuals and affidavit of Dr. Irving Borshuck. ¹⁵ |
| Jan 22-71 | Filed One envelope containing list of ethnicity of individuals and affidavit of Abraham P. Touchner. |
| Jan 22-71 | Filed One Envelope containing list of ethnicity of individuals and affidavit of Jacob B. Zack. |
| Jan 22-71 | Filed One Envelope containing list of ethnicity of individuals and affidavit of Murray Hart. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Cornelia Hess, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Dolores Chitano, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Carl B. Engberg, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Rose L. Schub, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Charles I. Scherhut, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Eugene T. Maloske, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavits of Elizabeth G. O'Daly, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Nellie R. Duncan, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Anthony J. DiPietro, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Elliott S. Shapiro, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Dr. Edwin J. Hess, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Ralph E. Pounds, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Valene M. Lloyd, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Max G. Willinstein, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Mrs. Edythe J. Grimes, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Alfredo Vazquez Jr., and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Martin J. Kitz, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Corrine K. Fischer, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Theodore Eisenenthal, and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Hugh McDaniel Jr., and list of ethnicity of individuals. (Impruned in Vault Room 602) |
| Jan 22-71 | Filed one envelope containing affidavit of Frederick H. Williams, Assist. Secy., Letter of Frederick H. Williams, Assist. Secy., affidavit of Fred H. Williams, Executive Director, office of personnel, letter of Frederick H. Eisenstein, Assist. Adm. Director, and affidavit of Mary Holloman, Comm'tee Superintendent, and list of ethnicity of individuals. (Impruned in Vault Room 602) |

Continued on back page.

~~Civil suit~~ Boston M. Chance et al., vs. The Board of Examiners and the Board of Education et al.

JUDGE TYLER

PROCEEDINGS

Date Order or
Judgment Noted

- 2/28/71 Filed one envelope containing affidavit of Samuel D. McClelland, and list of ethnicity of individuals. (Impounded in Vault Room 602)

2/28/71 Filed Notice of Motion re: Add Parties. Ret. 2/9/71.

2/28/71 Filed Memorandum in support of pltfs' motion to add parties, plaintiff, and amendment.

2/28/71 Filed Affidavit of Stanley Taylor, and placed in Envelope.

2/28/71 Filed Answering Affidavit of Mark A. Jacoby to pltfs' motion to add pltfs. and to amend amended complaint.

2/28/71 Affidavit of ethnicity of individuals, of Olvin McBarnette.

2/28/71 Affidavit of ethnicity of individuals, of Andrew G. Devaldson.

2/28/71 P.W.D. on motion papers filed 1/29/71. Motion granted on default. So ordered. Wyatt, J.

3/1/71 Notice of Settlement and Order. Filed Order that National Opinion Research Center is appointed to obtain and furnish to the court and the parties, evidence as to the ethnicity of all applicants for the examinations for supervisory service positions listed on Exhibit A-1, who are not currently employed in the New York City school System, etc., etc. So ordered. Mansfield, J. (mailed notice).

3/1/71 Filed COMPLAINT - CLASS ACTION.

3/7/71 Filed Complaint Affidavit of Thomas McGee, dated 3/6/71, Place in Vault Room 602.

3/27/71 Motion filed pur. to Judge Mansfield's Order of 2/16/71.

3/29/71 Request for Production of Documents under Rule 34.

3/29/71 Supplementary Report pur. to Judge Mansfield's order of 2/16/71.

4/1/71 Affidavit of Frederick H. Williams re: ethnicity of individuals. (Supplemental)

4/1/71 Request for Production of Documents under Rule 34.

4/15/71 Supplemental Affidavit of Thomas McGee, and placed in Vault Room 602.

4/18/71 Letter from University of Chicago re: signature of applicant Julius Perlman which has not been signed designating himself as "Caucasian or other".

4/18/71 Notice of Settlement and (Counter) Order. Ordered that the orders of this Court dated 12/29/70 and 2/16/71 are modified to the extent indicated, (1) The Clerk of the Court is directed to immediately transmit to counsel for the Board of Education the copy of the "pass-failist" and covering affidavit of Thomas McGee, Administrator of the Board of Examiners, heretofore filed and sealed pur. to this Court's Order of 12/29/70, etc., etc.

4/18/71 Mansfield, J. (mailed notice).

4/18/71 Letter from National Opinion Research Center, Applicants whose race/ethnicity in the N.O.R.C. report to the court of 3/28/71 was originally designated as not employed by the N.Y. City school system have stated to that organization that they are in the New York City school system . names starting with Pearl Crystal School, ending with James W. Salta.

4/22/71 Affidavit of Jacob E. Zack, Asst. Super., Office of High Schools re: ethnicity of individuals listed. (Impounded and Placed in Vault Room 602)

4/22/71 Filed Affidavit of Frederick H. Williams, Executive Director for Personnel, Office of Personnel re: ethnicity of individuals listed. (Impounded and Placed in Vault). One envelope.

4/26/71 Transcripts of Record of Proceedings of Dec. 18, 1970.

4/27/71 Affidavit of Frederick H. Williams, Executive Director for Personnel of ethnicity of individuals listed. (Impounded and Placed in Vault Room 602)

4/27/71 Affidavit of " " " " " " " " re: ethnicity information gathered by M.O.R.C..

4/27/71 Transcripts of ethnicity information gathered by M.O.R.C. (includes FF 1 - 50) re: ethnicity of individuals listed. (Impounded and placed in Vault Room 602)

4/28/71 Letter of Thomas McGee dated Apr. 26, 1971 Re: Pass-fail lists. (Impounded and placed in vault room 602 in original Pass-fail envelope.)

4/27/71 Response to Request to Produce Documents.

continued next page

CIVIL 4441 BOSTON M. CHANCE, et al vs. THE BOARD OF EXAMINERS AND THE
BOARD OF EDUCATION OF THE CITY OF NEW YORK

110 Rev. Civil Docket Continuation

BRIDGE WALKER

BOSTON M CHANCE et al. vs THE BD. OF EXAMINERS, etc. et al.

70 CIVIL 4141

JUDGE J. MANSFIELD

70 CIVIL 4141

PAGE # 6

JUDGE J. MANSFIELD

| DATE | PROCEEDINGS | DATE ORDER OR JUDGMENT NOTED |
|------------|--|---------------------------------|
| Oct. 20/71 | Filed Memo. in reply to defts. memo. opposing pltffs' motion for preliminary injunction. | |
| Oct. 20/71 | Filed Affidavit in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Affidavit in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Affidavit in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Affidavit of William H. Fuccia. | |
| Oct. 20/71 | Filed Affidavit in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Affidavit in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Affidavit in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed supplemental memo. in opposition to pltffs' motion for preliminary injunction-submitted by deft. Board of Examiners. | |
| Oct. 20/71 | Filed memo. on relevance of statistical tabulations submitted in support of pltffs' motion for preliminary injunction. | |
| Oct. 20/71 | Filed supplemental Affidavit of Jacob Cohen, in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Affidavit on the significance of statistical tabulations, submitted in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Second supplemental affidavit of Jacob Cohen in support of motion for preliminary injunction. | |
| Oct. 20/71 | Filed Second supplemental brief in opposition to prelim. injunction. | |
| Oct. 20/71 | Filed Brief of Public Assoc. Education of City of N.Y. | |
| Oct. 20/71 | Filed affidavit of Nathan Jaspen. | |
| Oct. 20/71 | Filed supplemental brief of the NY Assoc. of Black School Supervisors re: amicus. | |
| Oct. 20/71 | Filed affidavit of Richard S. Barrett re: research studies. | |
| Oct. 20/71 | Filed reply affidavit of Dr. Murray Peckowitz. | |
| Oct. 20/71 | Filed memorandum of law in opposition to pltffs' motion to allow a class action- filed by deft. Bd. of Examiners. | |
| Oct. 20/71 | Filed MEMORANDUM & ORDER-- Having been advised that a notice of appeal has been filed from our order granting preliminary injunctive relief, we shall defer further action with respect to motion for designation of suit as a class action until disposition of the appeal. So ordered-Hansfield, J. n/n | |
| Nov. 3/71 | III. A stipulation as to exhibits necessary for determination of the appeal. | |
| Nov. 3/71 | III. A stipulation that certain parts as listed in Appendix A concurred, shall be retained in the district court. | |
| Nov. 3/71 | Filed Notice that the record on appeal has been certified and transmitted to the U.S.C.A. for the 2d Circuit this 3rd day of Nov. 1971. | |
| Nov. 3/71 | Filed true copy of USCA order that motion of appellants to dismiss the appeal from U.S.D.C. & to strike all papers filed by said appellants is granted & it is ordered that Weiner & Gottlieb are granted leave to file a brief amicus curiae within 8 days, that copies of the brief shall be served on all parties & that appellants may file a counter-affidavit within 2 wks. after service of the brief upon them. ~n | |
| Nov. 3/71 | Dated Oct 20 Board of Education ANSWER to amended complaint. | NOV 1 1971 |
| Nov. 3/71 | Filed true Copy of USCA Order & Opinion that the order by Hansfield, J. granting pltffs' motion for prelim. injunction restraining defts from conducting further examinations for supervisory positions in the NY City school system, etc., hereby is affirmed with costs to be taxed against the appellant in the sum of \$13,00. Docketed as a Judgment #72,582 CLERK. (mailed notices) EMT: 6-1-72 | |
| Nov. 3/71 | RECEIVED - U.S. DISTRICT COURT - 6/12/72 | |
| Nov. 3/71 | Filed pltff's affidavit & Notice of Motion for default judgment, ret: 5/3/73 at 10AM in room 2604 before Mansfield, J. | |
| Nov. 3/71 | Filed pltffs memo in support of motion for default judg. | |

70 CIVIL 441 BOSTON M. CHANCE,, et al vs. THE BOARD OF EXAMINERS AND THE Page #7
BOARD OF EDUCATION OF THE CITY
OF NEW YORK
CIVIL DOCKET

| DATE | FILINGS--PROCEEDINGS | JUDGE MANSFIELD | AMOUNT REPORTED IN EXCEMPT PENDING |
|-----------|---|-----------------|---|
| | | | JUDGAL |
| Apr 25/73 | Filed Affdvt. of Serv. for Motion for Default Judgment, by pltf. Supporting Affidvt, & Memo of Law, on Defts. | | |
| Apr 26/73 | Filed Defts. Affdvt. in Opposition by Charles A. Miele to Motion. | | |
| Apr 26/73 | Filed Defts. Miele's Memo of Law in Opposition to Motion. | | |
| Apr 17-73 | Filed Request to Enter Default. | | |
| May 21-73 | Filed OPINION #39488, pltffs motion pursuant to Rule 23 is granted and this action is designated as a class action, etc. The stipulation of settlement dated Mar 8, 1973 is approved on conditions as set forth. The motion of pltff for a default judgment & prelim injunction are denied, subject to the condition that the prelim injunction in force is modified as indicated. Settle order on notice. Mansfield, J. mn | | |
| May 21-73 | Filed stipulation and order that plaintiffs may obtain discovery and use any depositions, interrogatories, etc. obtained thru discovery and in the same manner, etc. as if named persons continued to be parties to the action whether or not they are in fact parties at that subsequent date. So ordered. Mansfield, J. | | |
| Jun 12-73 | Filed Notice of settlement and Order determining this action as a class action, as indicated and a hearing is set for 6/28/73 at 10Am in room 501 to determine whether the settlement is fair and adequate. Mansfield, J. mn | | |
| Jun 26-73 | Filed Charles Wiener Notice of intention to appear and Notice of Motion to intervene, filed 6/25/73 | | |
| Jun 27-73 | Filed Frankle & Greenwald notice of Intention to appear for the Council of Supervisors & Administrators of the City of NY Local 1, etc. | | |
| Jul 5-73 | Affdvt of Elizabeth B DuBois in support of pltffs memo re; Intervene submitted by Charles Wiener | | |
| Jul 5-73 | Filed pltffs memo in response to application to intervene submitted by Charles Wiener | | |
| Jul 10-73 | Filed OPINION #39660. the applications of Mr. Wiener and CSA to intervene are denied, the stipulation of settlement should be approved as an interim procedure in the best interests of the pltff class and of the public school system as a whole. The stipulation of settlement is amended accordingly as provided at page 7-8 of the 5/21/73 decision to permit any party to apply to the court for modification of the judgment if a permanent plan is not adopted within the six-month period. Submit order accordingly on or before 7/12/73 Mansfield, J. | | |

FILING PROCEEDINGS

AMERICAN
REPORTED
EMOLUMENTS
RETURNS

1/2/73 Filed order that the preliminary injunction previously entered and filed 9-20-71, is hereby modified to require all defts in this action not bound by the Court's final judgment entered this date to adhere to the provisions contained herein pending final determination of the action as to them, except as provided. Mansfield, C.J. mn

1/2/73 Filed final judgment against deft Board of Examiners, its members and deft Chacellor of the City School Dist. of the City of NY, their agents servants employees and attorneys, and all persons in active concert and participation with them, are permanently enjoined and restrained from: conducting further examinations for supervisory positions; processing or grading or in any other way administering exams for supervisory positons or promulgating eligible lists kof issuing licenses solely on the basis of exams for supervisory positions, except as herein provided, entry of this judgment shall not constitute any determination of wrongdoing or misconduct and the Court reserves and retains jurisdiction herein for the purposes of entertaining applications for modifications as provided. Mansfield,C.J. Judgment entered 7-13-73, entered 7-19-73 mn

1/2/73 Filed affdvt of service of Notice of Settlement together with proposed Final Judgement and Preliminary Injunction.

1/3/73 Filed Notice of Appeal of Charles Wiener, mailed copies.

1/3/73 Filed Charles Wieners Notice of Motion for a Stay of Enforcement of the Stip of Settlement.

1/10/73 Filed Respondent 's notice of appeal to the U.S.Court of appeals, from order of Judge Mansfield dated 7-12-73. Mailed copy to E.B. Dubois-D.Greenberg & Kaye,Scholar,Fierman,Hays & Mandler.

1/10/73 Filed transcript of record of proceeding of 6-28-73.

1/14/73 Filed Charles Wieners designation of exhibits and statement of Issues

1/14/73 Filed deft Bd of Examiners notice of designation of additional parts of the transcript.

1/20/73 Filed Charles Wieners Notice of Appeal re: Stay of Enforcement.

mailed copies to DuRois;;Greenberg; Kaye Scholar Fierman Hays & Handler, and Corp Counsel. 8-30-73

1/17/73 Filed Stip & order extending the time to docket the appeal to 10-19-73. Mansfield,CJ.

BOSTON M. CHANCE, et al. v. THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK.

Page 2
PROCEEDINGS

JUDGE TYLER

| DATE | |
|-------------|---|
| SEPT. 10-73 | Filed Deft. Bd of Examiners for a modification of preliminary injunction in c. 26 to permit further examinations for supervisory positions, etc. |
| SEPT. 10-73 | Filed Stipulation of Settlement. |
| SEPT. 10-73 | Filed Affidavit in Opposition to plaintiffs' motion for a default judgment. |
| SEPT. 10-73 | Filed letter from Willie Parr & Gallagher to Judge Mansfield dtd. July 6-73. |
| SEPT. 10-73 | Filed Affidavit in Opposition to proposed Stipulation of Settlement. |
| SEPT. 12-73 | Filed Charles Wiener's (intervenor-appellant) designation of exhibits. |
| Oct. 13-73 | Filed plaintiffs' notice of designation of additional exhibits for inclusion in the record on appeal. |
| OCT 4-73 | Filed Notice of record certified and transmitted to U.S.C.App. on Oct. 4. |
| Aug. 13-73 | Filed deft's answering affidavit in opposition to motion for stay of enforcement. |
| Aug. 13-73 | Filed plaintiff's response to motion for stay of enforcement. |
| Aug. 13-73 | Filed memorandum of MANSFIELD, C.J., denying application of MR. CH. WIENER for a stay of enforcement. ES |
| Sept. 26-73 | Filed notice of designation of additional exhibits for inclusion in the record on appeal. |
| Dec. 27, 73 | Filed OPINION # 40151; Granting CSA and application to intervene in limited purpose of contesting issues raised by pltfiff. Subject to application by CSA to intervene or offer proff., the Board is enjoined until further order of this Court from implementing the transitional provisions of the CSA agreement. Mansfield, C.J. |
| Jan. 8-74 | Filed MEMORANDUM of Civil Reassignment to Judge Tyler. (rn) |
| Jan. 8-74 | Filed Order to Show Cause to intervene and for reconsideration of Decision dtd 12/27/73, ret. 1/21/74. |
| Jan. 18-74 | Filed Pltfiff's memorandum in response to motion for intervention and reconsideration of Council of Supervisors & Administrators |
| Jan. 18-74 | Filed Execution of Judgment 73-5436 Marshal's Returns: Served Lieb Goldstein & Co. Inc. by Louis Goldstein, Esq. on 7/30/73 . JUDGMENT UNSATISFIED.dtd 1/16/74 |
| Jan. | Andrew Stuart Assoc. by Mr. Arnold B. Cantor, on 8/22/74, JUDGMENT UNSATISFIED.dtd 1/16/74 |
| Jan. 22-74 | Filed Memo end.on Order to Show Cause to intervene,etc.dtd 1/3/74. Notion granted for intervention of petitioner, C.A. Lieb, L, etc. pursuant to Rule 23 FRCP and subject to limitations expressed in last paragraph of opinion of court(per Mansfield)dated 12/27/73. So Ordered. TYLER, J. (rn) |
| Jan. 22-74 | Filed Affidvt by L. Bernikow for Deft. The Bd. of Education. |
| Jan. 22-74 | Filed Affidvt of Saul Z. Cohen for Deft. The Bd of Examiners. |
| Jan. 23-74 | TRIAL CONFERENCE HELD BY Judge Tyler |
| Jan. 26-74 | Filed Letter from Frankle&Greenwald, Esq., dtd 1/28/74 in support of intervenor's motion for reconsideration and order of Judge Tyler dtd 12/27/73,etc. adjudicated. |
| Jan. 30-74 | PRE-TRIAL CONFERENCE HELD BY Judge Tyler |
| Feb. 4-74 | Filed Pltfiff's Memorandum in response to 1/28/74 Letter of Intervenor CSA |
| Feb. 26-74 | Filed Affidvt of Personal Service by Sheldon Schorer on 1/27/74 upon Eric D. Bolber, of Legal Action Center for Plaintiff -Order to Show Cause; Affidvt by Leonard Greenwald on 1/27/74 upon Leonard Greenwald Atty for respondent, -of Order to Show Cause. |
| Feb. 26-74 | Filed Deft. CSA Memorandum of Law in support. |
| Feb. 26-74 | Filed Memorandum in opposition to application of C.A. Lieb |

Civ. 4141 BOSTON M. CHANCE ET AL.

WALKER

DATE

PROCEEDINGS

- 12-74 Filed Plaintiff's Memorandum in response to motions for intervention and re-consideration of council of supervisors and administrators.
- Jan 12-74 Filed Execution on Judgment 73,5436 Marshall's return. Served: Liel Goldstein & Co. Inc. by Louis J. Goldstein, Pres. on 7/30/73 Judgment Unsatisfied 1/16/73 Andrew Stuart Assoc. by Mr. Arnold B. Gantor on 8/22/73. JUDGMENT UNSATISFIED 1/16/74

Civ.4141 BOSTON M.CHANCE ET ALVS.THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK

| DATE | FILINGS—PROCEEDINGS | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|------------|---|---|
| Feb. 26-74 | Filed MEMORANDUM OPINION #40395.Having granted CSA's limited intervention & heard reargument, I conclude that interim prohibition against implementation of CSA transfer provisions received full consideration before Judge Mansfield. Accordingly, court declines to rescind or alter decision of Judge Mansfield of 12/27/73. | |
| | So Ordered.TYLER, J. (un) | |
| Mar. 7-74 | Filed MEMORANDUM OPINION #40402. Board of Examiners is ordered to submit to court, a description of its proposed on-the-job evaluation procedures within 20 days of date of filing this memorandum and order.TYLER, J. (un). | |
| Mar. 13-74 | Filed Deft.Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO's Notice of Appeal from Memorandum and Order filed on 3/7/74 (Mailed copy to : Elizabeth B. DuBois, S.Z.Cohen, Norman Redlich, Esq., 3/13/74) | |
| Mar. 13-74 | Memo End.on Order of same date. Ordered that motion of Intervenor,Council of Supervisors and Adm.of The City of New York Local 1,SASOC,AFL-CIO is denied for following reasons: I have extreme doubt that order in question is appealable as a final order;assuming that this is an <u>interlocutory order</u> ,it does not seem to be appealable under 28 USC 1292;two judges acting for this court have each considered CSA's arguments,it seems thus unlikely that appeal of this narrow ,side issue will do any more than delay resolution of the case in chief: at present,it appears more than likely that the entire litigation may soon be concluded at the district court level:and the order which CSA attacks have been in effect since 12/27/73;hence there seems to be no compelling urgency for this appeal if such legally is permissible,to go forward. TYLER, J. | |

**Letter of Elizabeth B. DuBois, Esq., dated
November 15, 1973**

LEGAL ACTION CENTER
OF THE CITY OF NEW YORK

271 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 679-6502

November 15, 1973

Board of Directors

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W. HAYWOOD BURNS
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FREDERICK A. O. SCHWARZ, JR.
MICHAEL I. SOVERN
HERBERT STURZ
RAYMONDS TROUBH

The Honorable Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners

Dear Judge Mansfield:

Staff
ELIZABETH B. DUBOIS
ERIC D. BAILEY
MARK C. MORRIL
MICHAEL E. SMITH

Counsel for plaintiffs agreed with counsel for defendant Board of Education to request this conference to try to resolve informally questions that have arisen with respect to whether defendants are in contempt of the Court's orders of July 12, 1973.

It is plaintiffs' position that defendant Board of Education, the Chancellor, the Executive Director of the Office of Personnel and their agents [hereafter referred to simply as defendant Board of Education] are in contempt of those orders.

Defendant Board of Education has taken the official position that all vacancies in supervisory positions must be filled in accordance with the 1969-73 C.S.A. contract. This contract provides, inter alia, that where five or more persons on the union transfer list (which consists of persons with five years' seniority) apply for a vacancy, the appointing authority must appoint one of the five to the vacancy.

The Board of Education has apparently expressed its official position in a variety of ways of which plaintiffs have only partial knowledge. It is at least clear, however, that numerous directives have been sent out instructing community school boards that they are obliged to fill vacancies in accordance with the union transfer provisions. See Exhibit 1 attached hereto.

page two

The settlement, as incorporated in the Court's Orders, was specifically designed to prevent the use of these provisions of the C.S.A. contract to force community school boards to fill vacancies with persons from the union transfer list. The language in the Orders which was designed to cover this appears in paragraph VIII, subparagraph two:

"...the appointing authority is authorized to fill vacancies either by the assignment of acting personnel, or by the appointment of licensed personnel. Nothing in this Judgment, or in any law, regulation, by-law, or contract, shall be deemed to require that vacancies be filled by licensed personnel."

(emphasis added)

There appears to be no dispute between counsel for the Board of Examiners and counsel for plaintiffs with respect to the meaning of this provision of the Orders. Since it is we who negotiated the settlement, without the assistance or participation of counsel for the Board of Education, we are presumably the persons to look to for the meaning of its language, assuming there is any ambiguity.

I hope that this matter can be promptly resolved by the Court, and the harm which has already been caused plaintiffs and their class remedied by some appropriate order. In this connection I should point out that plaintiffs' counsel have been trying to resolve this informally since early October. See letter to counsel for defendants dated October 11, attached hereto as Exhibit 2. While this effort was being made and without notice to plaintiffs, defendant Board of Education sent out directives of the very kind which plaintiffs contend violate the Court's Orders. See the directive attached as Exhibit 1, dated October 26.

My information as to the harm plaintiffs and their class have suffered by reason of the Board's violation of the Order is limited, since I do not know everything the Board has done to effectuate the union transfer provisions. I have been informed, however, by school personnel, members of community school boards and parent association representatives that local boards have received both written and verbal instructions to fill vacancies in accordance with the contract provisions. I have also been informed that acting supervisors appointed to vacancies for which

November 15, 1973

page three

-14a-

persons on union transfer lists had applied have been denied the salaries appropriate to their positions.

Thank you for your attention to this matter.

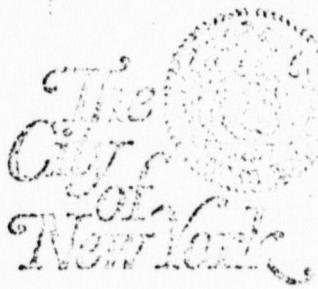
Sincerely,

Elizabeth B. DuBois
Elizabeth B. DuBois
Attorney for plaintiffs

EBDB:MR
enc.

cc: Saul Z. Cohen, Esq.
Leonard Bernikow, Esq.

Letter of Leonard Bernikow, Esq., dated
November 16, 1973



LAW DEPARTMENT
MUNICIPAL BUILDING, NEW YORK, N.Y. 10007

NORMAN REBLICH, Corporation Counsel

November 16, 1973

Hon. Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Education

Dear Judge Mansfield:

This letter is submitted to respond, and in opposition, to the letter of Elizabeth B. DuBois, dated November 15, 1973, submitted to your Honor. In her letter, Ms. DuPois basically asserts that the transfer provisions of the collective bargaining agreement, between the Board of Education and the C.S.A., may not be enforced by the Board of Education based on paragraph VIII, subparagraph two of this court's orders dated July 12, 1973. The orders of July 12, 1973 incorporate as Exhibit C, Circular #30 dated October 25, 1972 which states as follows: "Collective bargaining agreements may also contain provisions pertinent to the selection process." The orders also contain a supplement to Circular #30 dated January 4, 1973 over the signature of Harvey B. Scribner, Chancellor, stating "the transfer plan of the collective bargaining agreement currently in effect is applicable if a supervisory position is located in a school." Therefore, the orders incorporate the provisions now being questioned by the plaintiff.

Counsel for the plaintiff apparently misjudges the applicability of the transfer plan. In her letter of October 11, 1973, Exhibit 2, to her November 15 letter, she states that the transfer plan would "give priority to persons on transfer lists as compared to acting supervisors presently serving in the officially vacant positions." It is the position of the Board of Education that when an acting supervisor is properly appointed to a vacancy as described in Circular 30, the position is no longer vacant as long as that acting supervisor serves and continues in that position in accordance with the terms of the July 12th order.

In her letter, Ms. DuBois interprets the term "licensed person" as contained in paragraph VIII, subparagraph two, to include a group of persons who are in no way covered by the court's orders of July 12, 1973. The class of persons referred to by Ms. DuBois are assistant principals. She is questioning the validity of transfer provision which gives assistant principals, under certain circumstances, the right of transfer to a regularly established vacancy. These circumstances are significant. As of today, no assistant principal would be eligible for transfer under these provisions unless he had been licensed and appointed prior to November 1968, had served continuously in the school from that time and therefore had acquired tenure prior to the entry of the first preliminary injunction in this case. In short, the rights which plaintiff would diminish are the rights of persons who, for a period of years, and in some cases as many as fifteen years, have been tenured and serving in their positions. (It should be noted that in determining seniority among those who have completed five years of service, one year in a special service school counts as a year and a half).

The orders of July 12, 1973 concern only five classes of persons. Pursuant to paragraph III thereof, they are: 1) persons whose names appear on Board of Examiners lists which have been promulgated; 2) persons who appear on lists which have been completed but not promulgated; 3) persons whose names appear on lists which have been prepared but not completed pending further check; 4) persons who have previously taken and passed a written examination and who may be appointed to acting positions; 5) persons who have been or will be appointed on an acting basis to fill a vacancy in accordance with Circular #30 or its applicable predecessors.

The granting of a license does not and never has given an automatic right to an appointment. Once appointed a supervisor is either an acting supervisor under the terms of this order, or, if previously appointed, is either a probationary supervisor in a regular appointment, or a tenured supervisor. When reference is made to a "licensed" person, there is an immediate assumption that this person had never previously been appointed to a regular vacancy. This interpretation is further supported by the terms of the order itself, which in paragraph VIII, subparagraph one, precludes a contract from requiring a community board or the central board to give priority to any one such group of persons against another. The word such refers back to those

persons who are licensed and referred to in paragraph III or appointed as acting. This clearly does not include previously appointed and tenured persons.

The major thrust of the instant law suit as well as the preliminary orders is to regulate examination and licensing procedures for new candidates for supervisory positions, and does not affect the status of those who were already serving in regular positions. It also altered the procedures of appointment for persons who had been previously licensed but not appointed. Thus, the term of licensed person refers to this group of people and to no other. It must be emphasized that the class of persons who would be adversely affected by plaintiff's interpretations are those who were appointed under license prior to November, 1968.

As we read this order and the provisions particularly relative here, the language is simple, logical, and easily understood. Its clear meaning is that neither the community boards nor the Central Board of Education can, as between the groups affected by this order, require that vacancies be filled by licensed personnel. It permits their appointment but does not compel it. Clearly, no reference can be read into this language that can conceivably refer to supervisors who were filling positions on regular appointment from five to perhaps twenty years prior to the entry of the order and who are tenured.

The interpretation urged by the plaintiffs would eliminate the transfer provisions of the collective bargaining agreement with the CSA relating to the transfer rights of assistant principals. It should be noted that this provision was one of the more contentious provisions in the collective bargaining negotiations.

The position of the Board of Education is clear. The transfer position of the contract applies only at the time a vacancy is created. It does not apply where, in accordance with the order, an appointed acting supervisor receives a license and the community school board or Central Board thereafter makes the appointment. The transfer provision is not applicable at that point. It should be noted that if an assistant principal receives a transfer under the provisions of the contract, that an automatic vacancy is continued. Therefore, the transfer plan does not diminish the total number of vacancies available for a new appointment.

No one in the plaintiffs' class is prejudiced. The transfer plan does not diminish the rights of any person presently serving in the acting supervisory positions.

Finally, Ms. DuBois indicates in the first paragraph of her letter that the purpose of the conference scheduled for this afternoon at 3:00 P.M. was to "resolve informally questions that have arisen with respect to whether defendants are in contempt of the court's orders of July 12, 1973." The conference, as I understand it, is to clarify the meaning of certain terms contained in the court's orders which the defendants believe are already quite clear. If there is to be a change in the language of the order or if the meaning of certain terms is determined to be contrary to the Board of Education's normal understanding of the terms, then the Board requests that a more formal proceeding be held in order to give the court a full presentation of the respective positions. This procedure would particularly be necessary since the construction urged by the plaintiffs substantially diminishes the rights which were bargained for collectively by the C.S.A. in the contract which became effective October 1, 1969, and which are continued but substantially amended in the new contract. Accordingly, we believe the presence of a representative of the Council of Supervisors and Administrators is absolutely necessary at any subsequent proceedings which may follow involving the rights of its members which now includes acting supervisors.

Respectfully yours,

Leonard Bernikow
Assistant Corporation Counsel

CC: Elizabeth DuBois
Saul Z. Cohen

**Letter of Leonard Greenwald, Esq., dated
November 26, 1973**

LAW OFFICES
FRANKLE & GREENWALD

MAX H. FRANKLE
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(212) 242-0200



November 26, 1973

Hon. Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance et al v. Board of Education

Dear Judge Mansfield:

On November 15, 1973, at a monthly consultation meeting with the Chancellor of the City School District of the City of New York, the Council of Supervisors and Administrators of the City of New York, Local 1 SASOC, AFL-CIO ("CSA") was advised that counsel for the above named plaintiffs had taken the position that the Board of Education, in implementing the transfer provisions of the collective bargaining agreement, was in contempt of this Court's order of July 12, 1973.

On November 16, 1973, counsel for the CSA was permitted, over the opposition of plaintiffs, to attend a conference in the Court's chambers at which the matter of the transfer provisions were discussed.

This letter expresses the position of the CSA in regard to the newly raised contention of plaintiffs. CSA deems it relevant to discuss as background its collective bargaining relationship with the Board of Education.

The first collective bargaining agreement between the Board of Education and the CSA's predecessor, the Council

Hon. Walter R. Mansfield

-2-

November 26, 1973

of Supervisory Associations, was entered into on or about October 1, 1969. That collective bargaining agreement expired on or about October 1, 1972.

The CSA or its predecessor has had a collective bargaining relationship with the Board of Education going back in some instances nearly four decades. On or about February 1, 1963, the then Superintendent of Schools, Bernard E. Donovan, recognized the CSA as spokesman for various affiliated organization in regard to such matters as "salaries and working conditions."

On or about May 5, 1965, the Board of Education and the CSA entered into a "Memorandum of Agreement" in which the Central Board agreed to meet with the CSA "with respect to [supervisors'] working conditions, salary schedules and grievance procedures." The aforementioned Memorandum of Agreement was subsequently modified on many occasions.

On or about June 29, 1966, as a result of negotiations between the CSA and the Central Board, a declaration of trust establishing the "CSA Welfare Fund" was formulated and implemented.

On or about October 1, 1969, as indicated above, the first formal and extensive bargaining agreement was concluded.

On or about May 1, 1971, the AFL-CIO established the School Administrators and Supervisors Organizing Committee, AFL-CIO. Thereafter, the CSA applied and was granted membership in that organization, known as SASOC, AFL-CIO.

The agreement of October 1, 1969 between the CSA and the Board of Education contained the usual collective bargaining provisions, including a provision for transfer (Article VIII). As to principals of elementary, intermediate

Hon. Walter R. Mansfield

-3-

November 26, 1973

and junior high schools, these individuals, after completing five years or more of continuous service, were granted the opportunity to seek transfer. The Central Board maintained the absolute right to accept or reject such applications for transfer without restriction. There was no compulsion upon the Central Board to either accept or reject any transfer. No transfer provision for high school principals was evolved.

As to intermediate supervisors in elementary, intermediate, junior and senior high schools, a more formal transfer provision was maintained. Intermediate supervisors who had completed five or more years of service as a supervisor could apply for transfer. In the event five or more supervisors applied for transfer, the receiving district was required to interview all applicants. The receiving district or Central Board was then required to select from among the five or more applicants the one applicant it deemed best suited. It should be noted that seniority was not calculated upon licensure but rather upon time in service, with a year of service in a special school (i.e., school for emotionally disturbed and/or socially deprived children) counting as a year and a half seniority for each year of service.

Upon the expiration of the contract on or about October 1, 1972, an express agreement was reached with the Board of Education in which the current contract was considered to be in full force and effect until another collective bargaining agreement was reached and that any subsequent collective bargaining agreement negotiated would be retroactive to October 1, 1972.

The transfer provision contained in the aforementioned collective bargaining agreement has been in full force and effect from October 1, 1969 to October 1, 1972, and remained in full force and effect until the current collective bargaining agreement was negotiated and ratified by the CSA membership on or about August 20, 1973. During this

Hon. Walter R. Mansfield

-4-

November 26, 1973

period of time transfers have been regularly processed pursuant to the agreement. Indeed, a number of grievances have been presented and forwarded to arbitration concerning the transfer provisions. The most recent arbitration award on the issue of transfer was received less than two months ago.

At the inception of this action the CSA sought to intervene as a party-defendant. In an affidavit supporting its motion to intervene CSA noted that the preliminary injunction vitally affected its membership's rights under the collective bargaining agreement, specifically indicating the transfer provisions thereof.

Plaintiffs opposed the motion, maintaining that there was nothing in the action which affected "its [CSA's] membership" and that the proceeding did not involve any "interest of the CSA's members" that could not "be protected other than by letting those interests be represented in court by the CSA." Annexed hereto are portions of plaintiffs' brief in opposition to the motion to intervene.

The Court rejected the CSA's motion to intervene.

Pursuant to the Court's order dated June 12, 1973, public notice was given pursuant to Rule 23(c). At the hearing the CSA again appeared, seeking intervention. It advised the Court that since the initial action the CSA had become the collective bargaining representative of all acting supervisors appointed pursuant to Circular 30. The CSA advised the Court that these acting supervisors, nearly 1,000 in all, predominantly minority group members, had overwhelmingly selected the CSA as their collective bargaining agent. The Court was also advised that the CSA was now negotiating for these acting supervisors. The plaintiffs were in fact creating a group of second-class supervisors, that is, acting supervisors, who possessed none of the privileges, benefits and emoluments of supervisory status. The Court, in a decision dated July 10, 1973, noted that "CSA's present status as collective bargaining representatives of individuals who have been assigned to acting supervisory

Hon. Walter R. Mansfield

-5-

November 26, 1973

positions does not in our view give it any greater interest in the subject matter of the action."

The Court noted (pages 65-65 of the official transcript) its concern with the category of acting supervisor which had been described as a kind of hybrid. The Court also was especially concerned with the "problems that are raised about the interaction of the acting versus the earlier certified listed eligible licensees" The Court also noted that there was a "necessity for making sure that "it [the settlement] remain only a interim system and that all speed be developed toward the promulgation of a final examination system that will satisfy the requirements that we specified in the original decision."

The District Court's concern was echoed by the United States Court of Appeals which noted in its decision that this "case should not linger on in its present unfinished state."

At no point during the extensive argument which preceded the settlement of the Court's order of June 12th did plaintiffs ever contend that the settlement was in fact pre-empting a vital area of collective bargaining. There has never been an allegation in the complaint or anywhere else that the collective bargaining provisions of the CSA agreement were discriminatory in effect or application. It must be noted that the order of July 12, 1973 incorporated as Exhibit 3 Board of Education Circular No. 30 dated October 25, 1972. That circular provides in pertinent part as follows:

"Collective bargaining agreements may also contain provisions pertinent to the selection process."

Circular No. 30 also contains a provision which notes that the "transfer plan of the collective bargaining agreement currently in effect is applicable if a supervisory position is located in a school."

Hon. Walter R. Mansfield

-6-

November 26, 1973

Paragraph II C of the settlement specifically defines "vacancy" as that term is used in Special Circular No. 30. In addition, appointment to fill a vacancy is also defined as a procedure "in accord with previously applicable procedures, or in accordance with procedures subsequently developed by the Chancellor or the Board of Education, ..."

The very wording quoted above specifically incorporates the transfer procedures of the collective bargaining agreement. It should be noted that counsel for the Board of Examiners has specifically disclaimed any agreement on the Examiners' part to nullify or modify the relevant provisions of any collective bargaining agreement.

At the public meeting at which Circular No. 30 was adopted the CSA took a number of positions of direct and immediate benefit to acting supervisors. It successfully urged that acting supervisors appointed to any supervisory level be paid the appropriate wage level. Previous Board policy had limited payment to acting principals. This position was opposed by a number of specific organizations allegedly representing acting supervisors' interests.

At the negotiations which preceded the collective bargaining agreement the acting supervisors were represented at all steps by one of their peers, a black acting assistant principal. An extraordinarily large number of acting supervisors had expressed the concern that plaintiffs were not interested in a quick and just solution to the litigation. The appointment of acting supervisors had become a matter of great controversy in this city. Charges of corruption and nepotism were again flourishing, this time against many community boards. Many noted advocates of decentralization, including the distinguished Dr. Kenneth Clark, have studied the current situation and have specifically indicated the need for legislation to cure the widespread nepotism and corruption which they deem characteristic of many local boards. The appointment process has led to a number of administrative

Hon. Walter R. Mansfield

-7-

November 26, 1973

and judicial actions in which various individuals have contended that they have been discriminated against. A number of black acting supervisors have charged that predominantly Hispanic districts are seeking to exclude them from supervisory positions. So too, have a number of Hispanic supervisors contended that they are being discriminated against by either black or white controlled school boards. As a result of this concern the latest collective bargaining agreement incorporates within it a due process provision for all acting supervisors. Under this provision an acting supervisor could not be removed from his position without the community board first advising him of his deficiencies and only after an appeal to the Chancellor had been taken. These new provisions for acting supervisors are similar to those enjoyed by regularly appointed supervisors. In a number of other important areas the acting supervisors benefited from the current collective bargaining agreement. The agreement was approved by the representative of the acting supervisors. It was then submitted for ratification to all CSA members including acting supervisors. The agreement was overwhelmingly ratified.

In the quid pro quo of collective bargaining agreements a number of rights and privileges of vital concern to other supervisors were dropped or diminished in exchange for the vital protections given the acting supervisors.

At this juncture it is appropriate to note that this case does "linger on." The CSA regards the attempt of the plaintiffs to abort a vital part of its collective bargaining structure not only an effort to have this case "linger on" but to enlarge its "unfinished state." We regretfully believe that the current effort by plaintiffs is nothing more than an attempt to extend the present chaos in which the school system now finds itself.

Coming less than two months after the conclusion of a second collective bargaining agreement, CSA believes that plaintiffs' effort is also directed toward shifting the legislative priorities noted in Article 52-A of the Education Law. Section 2590-g of the Education Law specifically makes the Central Board the "government" or "public

Hon. Walter R. Mansfield

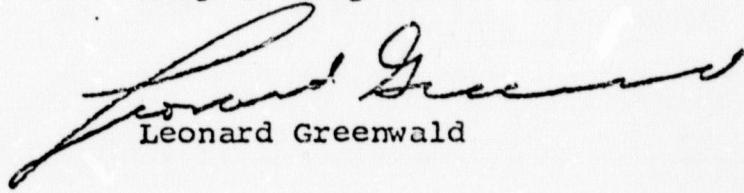
-8-

November 26, 1973

"employer" of all employees "appointed or assigned by the city board or the community board." Section 2590-g also designates the city board as the "government or public employer of all persons appointed or assigned" who are subject to the Taylor Act (Article XIV of the Civil Service Law). The Legislature specifically endowed the Central Board with all of the powers and prerogatives inherent in collective bargaining. It specifically excluded the Chancellor's office, the Chancellor and the local community boards. Plaintiffs' efforts are directed towards destroying this legislative mandate.

CSA joins with the Board of Education in requesting that a formal proceeding be held in order to give the Court a full and complete presentation of the issues raised by plaintiffs' motion. CSA respectfully submits that nothing less would be adequate.

Respectfully submitted,



Leonard Greenwald

LG:js

cc: Leonard Bernikow, Esq.
Elizabeth DuBois, Esq.
Saul Z. Cohen, Esq.

Letter of Joseph P. Flemming, Esq., dated
November 27, 1973

LAW OFFICES

FLEMMING & ZULACK
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NEW YORK, N.Y. 10005

JOSEPH P. FLEMMING
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TELEPHONE (212) 952-0915
CABLES "EGALITE"
TELEX 232123

November 27, 1973

The Honorable Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners

Dear Sir:

The undersigned have been retained by Eugene Mirsky, Daniel Andronofsky, Robert Roxenberg, Helen S. Kurzban and Murray Braman, on their own behalves and on behalf of other persons similarly situated in their and other community school districts, and by the Presidents Council of District 25, acting on their own behalf and on behalf of other persons and organizations similarly situated, to apply to this Honorable Court for the opportunity to comment upon the issue of the effect of the captioned case upon Article VIII(B) (the "CSA transfer clause") of the Collective Bargaining Agreement (the "CSA Contract") between the City Board of Education and the Council of Supervisory Associations.¹

¹B. INTERMEDIATE SUPERVISORS IN ELEMENTARY, INTERMEDIATE, JUNIOR AND SENIOR HIGH SCHOOLS

1. To be eligible for transfer an intermediate supervisor in an elementary, intermediate, junior or senior high school shall have completed five or more years of continuous service in the license in the school from which the transfer is sought.
2. The five applicants with the greatest seniority will be interviewed by the receiving district or community superintendent, or the appropriate assistant superin-

I. Description of these intervenors.

Messrs. Mirsky, Andronofsky, Roxenberg and Braman, and Mrs. Kurzban, are each licensed teachers in the City School System who are presently serving as and performing the duties of assistant principals in elementary schools in Community School District 25, Queens. Each has applied for and hopes to serve permanently in such position.² Each has been advised that his or her application cannot be considered for the reason that five licensed assistant principals have applied for position under the CSA transfer clause. Each has State Certification for his position and believes him or herself otherwise also to be eligible for such position. Their average length of service in District 25 is seven years. Three are residents of Queens, and two of Long Island.

The foregoing five named individuals are hereinafter collectively called the "Applicants". A further description of the Applicants is contained in the appendix to this submission.

In addition, the Applicants understand and believe that there are numerous other persons having State Certification

tendent for high schools. Seniority is to be calculated on the basis of years of service under appointment in license, with each year in a special service school counting as one and one-half years.

3. If five or more eligible persons apply, the selection shall be made from among the five applicants with the greatest seniority. If fewer than five eligible persons apply, existing eligible lists may be utilized.
4. Consent of the releasing district will not be required.

²The Applicants argue for the purpose of this intervention as if the respective positions in which they are presently serving may be vacant under applicable City Board policies, and so available to be filled pursuant to applicable policies, but do not necessarily admit that said positions are vacant, and reserve the right herein or elsewhere to maintain that their respective assignments were such as to fill the respective vacancies and foreclose further or subsequent attempt by the City Board or District 25 to declare them vacant otherwise than by reason of removal for cause.

and the other requisites for assignment as assistant principal, whose names are unknown to them, who are similarly situated to the Applicants in that they are employed in District 25 or other districts similarly situated and in that they have or in the future will apply either for the identical vacancies in District 25 for which the Applicants have applied or for other vacancies present or future in District 25 or such other districts similarly situated.

The Presidents Council of District 25 consists of the elected presidents of the Parent or Parent Teacher Associations of the 31 elementary, intermediate and junior high schools in District 25, Queens. Their letter to this Honorable Court, dated November 24, 1973, is submitted herewith and made a part of this submission.

In addition, the Presidents Council believes that there are numerous parents, and numerous other parent or parent teacher associations and district-wide associations of parents or such associations similarly situated.

II. The issue as it affects District 25 and other districts similarly situated.

The Applicants and the Presidents Council believe and allege that it is and has long been a demographic fact of life in the City of New York that a disproportionate number of the professional class do and have always tended to live either in the suburbs or in the outer parts of the respective boroughs of the City of New York. Additionally, they believe and allege that primarily by reason of the economic and social organization of the neighborhoods in the outer parts of the respective boroughs the schools in these areas have traditionally been reputed to offer better working conditions than schools in less fortunate neighborhoods. For these reasons alone, but not without the possibility of less meritorious reasons as well, the great preponderance of assistant principal vacancies in District 25 have been and continue to be filled by senior licensed supervisors who transfer into District 25 under VIII(B)(3) of the CSA transfer clause from positions in Manhattan or elsewhere within the interior portions of the boroughs.³

³Wherever five transferees apply, other candidates, no matter how qualified, not only "need not apply", they may not even be considered. The impact of transferees upon an entire district is magnified by the usual repetition of the same names in the case of each successive vacancy, since transferees may apply for an unlimited number of vacancies at one time, and usually do. Thus a mere nine transferees can exhaust the candidacies for five schools!

Consequently the supervisory staffs in such districts as District 25 consist overwhelmingly of licensed supervisors at the high end of the salary scale. Additionally, since by definition all such transferees have heretofore acquired tenure, the acquiring districts have no occasion to exercise probationary jurisdiction, review and evaluation over the transferees. Finally, deserving and experienced teachers within District 25 and similar districts are for all practical purposes denied the opportunity of promotion and recognition within their own schools or within their own districts.

Thus the staff in District 25 and similarly situated districts is more annuated, more expensive per pupil and less subject to either screening or supervision by the district than is the case in dissimilarly situated districts. Compounding the problem, districts such as District 25, already having less control over their existing supervisors, perversely have less to offer, in the way of aspiration and promotion, to their existing teachers.

III. The issue as it affects the Applicants.
other professionals similarly situated,
and certain other professionals dissimilarly
situated.

1. In General. Prior to what has become the "Mansfield Decision", it was necessary in New York City to acquire a license from the Board of Examiners before it was possible to receive an assignment to a supervisory position. As from the issuance of the Preliminary Injunction in September 1971, it was no longer necessary to have a license to be assigned to a supervisory position. As from the entry of the Final Judgment in July 1973, it appears that, except for previously existing licenses or licenses derived from previously taken examinations, and pending an eventual permanent system of licensing still to be developed, it is necessary to be assigned to a supervisory position before it is possible to have the opportunity to acquire a license.

2. The original plaintiffs as a class will suffer racial discrimination and denial of equal protection should the Final Judgment not overrule the CSA transfer clause. The Applicants submit that two significant and constitutionally protected classes of professionals would be unnecessarily, inequitably and unconstitutionally prejudiced if the Final Judgment in the Chance case is permitted to be construed by the City Board of Education to permit continued application

of the CSA transfer clause. The first such class is that of the original plaintiffs in the case, namely, the black, Puerto Rican or other minority race professionals whose prior access to supervisory license was found in this case to have been discriminatorily limited and who, as a result of this case, may henceforth acquire supervisory licenses (pending any other or further permanent process hereafter to be developed and approved) only through the process of being accepted as a candidate for an existing vacancy and being further qualified by observation of his performance. So long as the CSA transfer clause is permitted to be applied with respect to assistant principals (which is, of course, the entry point for most supervisors), existing experience indicates that most vacancies that occur in such districts as District 25 will be compulsorily filled by transferees. As a result, notwithstanding a perfectly common preference among the plaintiff class, similar if not necessarily as frequent, to whites, both to live and to be employed in or abutting districts such as District 25, and notwithstanding the statistical certainty that a significant number of this class may have professional skills and attributes more likely to be effective and recognized within the social or economic circumstances of schools in districts such as District 25 than in schools in poorer sections of the city, it will be rare for any member of this class to have even the opportunity to apply in any school or district such as District 25 for the position which is now a condition precedent to obtaining a license.

Nothing appeared more fundamentally clear in the evidence in the Chance case than that the spectrum and subtlety of the attributes and skills making for a superior educator on a supervisory level were such as to make categorical, exhaustive and general judgments unacceptable. So the thrust of the Final Judgment, incorporating as it did the thrust of the Chancellor's sophisticated and flexible selection and evaluation procedures, was to recognize in a non-discriminatory manner the different mixes of professional skills and attributes likely to be successful in different circumstances. One man's strengths may or may not complement another's, but it is agreed that usually they differ. Under the present regime each district is to seek out those particular strengths which are more important within the context of their particular schools. It is exactly this officially imposed differentiation in the selection process that makes it necessarily contrary to the thrust of the Chance case to

-6-

restrict the opportunities for the plaintiff class to seek a position (and thereby to establish his credentials through performance) only to schools in predominantly poor or minority districts.

Further, it should also go without saying that this same restriction as to the plaintiff class will lead not only to continued but to increased racial segregation of supervisory staff in the New York City schools.

3. Applicants as a class will suffer denial of equal protection should the Final Judgment not overrule the CSA transfer clause. The second class which would be prejudiced by permitting the CSA transfer clause to apply is the class to which the Applicants belong, namely, all those professionals who, by reason of residence, preference or accident, have spent most or a great part of their professional life as teachers in schools in such districts as District 25; whose skills and strengths have been shaped by and to the needs of such schools; whose performance has been measured over the course of the years by the parents of the children, by the supervisors and by the successive school boards in such districts; and who have had little or no occasion in their entire professional life to acquire those other or further skills which might be absolutely essential to be successful candidates for position, much less successful in performance, in the eyes of the parents of the children, of the supervisors and of the school boards in starkly different neighborhoods.

This class, which formerly to the Chance case was able on a more or less equal, or even advantaged, basis, to acquire supervisory licenses by the examination process, fear now to be caught between the sword of the CSA transfer clause and the anvil of the Chance case. That is, should the CSA transfer clause be permitted to apply, this class will have no opportunity for employment, and therefore to acquire license, except upon application as candidates for vacancies in districts far from their own, both in geography and in entirely legitimate but often quite different criteria.⁴ This would place upon this class an inordinate burden which on a statistical basis would certainly and immediately result in a severe and unjustified deprivation of opportunity for professional advancement.

⁴In a city measuring 50 miles from southwest to northeast, and 35 miles from northwest to southwest, the plain facts of distance and dissimilarity are inescapable.

While under Article VIII(A) of the CSA transfer clause principals are entitled to transfer out of their existing district, after a certain number of years, and therefore are eligible to apply for vacancies in other districts, the community school boards are not required to restrict their consideration of candidates to such transferring applicants. Conversely, while Article VIII(B) similarly permits assistant principals serving in one district to apply for a vacancy in another district, Section (3) thereof reaches further so as to forbid the Community School Board from even considering, much less selecting, anyone other than among the five senior transferees, wherever five or more such transferees apply, so that at present in District 25 not one incumbent applicant can even be considered for any of the five existing vacancies. Thus home district candidates for principal are at least permitted to compete against transferring principals in District 25 and similarly situated districts, while the Applicants and their class are not.

So long as by reason of the CSA transfer clause they will have virtually no foreseeable opportunity to apply for positions in their own or similarly situated districts where their professional strengths are presumptively more pertinent, the Applicants and their class are exceedingly deprived of an opportunity to compete equally in that their only opportunity will be against candidates who are competing on their home grounds with a presumptively more pertinent complex of professional skills and attributes.

IV. Analysis.

The Applicants and the Presidents Council are obviously unable to comment upon the actual or presumed intentions of the parties to the Final Judgment of July 1973. The Applicants and the Presidents Council have undertaken to bring to the attention of this Honorable Court some of the factual implications of this issue, some of which they respectfully urge will result in the denial of equal protection to them and their respective classes, as well as the possibility of discrimination both as to them and as to the original plaintiffs in the Chance case on racial grounds.

It is respectfully submitted that when government purports to act in a manner which appears to act unequally upon different similarly situated persons or classes, the burden shifts to the government to justify its practice, and that where some "fundamental right" is at stake, the government

must show a "compelling state interest", a burden and a showing which it is respectfully urged cannot be met here.⁵ It is also respectfully submitted that it could not have been the intention of either this Honorable Court or the original parties hereto to replace one discriminatory system of licensing by another.

It is further respectfully submitted that the language of Section (4) of the Preliminary Injunction was clear enough for party and non-party alike to conclude and believe that it meant what it said, namely, that thenceforth all vacancies would be available to all candidates satisfying certain educational and experience qualifications, "without regard to whether such persons presently hold supervisory licenses, or regular appointments or assignments," and that accordingly it would be assumed that counsel to both plaintiffs and defendants would have so understood the meaning and intent of the Final Judgment to be equally clear, and to have submitted paragraph VIII of the Final Judgment with this intention and understanding. We are, in fact, advised that counsel both to the plaintiffs and to the Board of Examiners have so expressed themselves.

Undoubtedly the City Board of Education has found itself under understandable pressure by the CSA to read another meaning into the Preliminary Injunction and/or the subsequent Final Judgment. However, we cite the various pronouncements issued by the City Board and the Chancellor in the wake of the Preliminary Injunction. The Board's Interim Procedures adopted October 1971 made no reference to the transfer clause or to transfers, as such, one way or the other. Nor was any reference made to transfers, one way or the other, in the Chancellor's Special Circular No. 42 in January 1972, but it must be said that no reasonable construction of that Circular could be made except upon the basis that the procedures described therein would "apply effective this date in the assignment of acting supervisory personnel in the citywide school district when such assignment is for a period of three calendar months or more", without exception. This same language was continued in the Chancellor's Circular No. 30 in October 1972, and, in addition, the

⁵See Shapiro v. Thompson, 394 U.S. 618, 638 (1969);
Van Dusartz v. Hatfield, 334 F.Supp. 870 (D.Minn. 1971);
Morales v. Schmidt, 340 F.Supp. 544, 550 (W.D. Wis. 1972).

universality of the procedure to all positions seemed to receive emphasis at paragraph III(a)(8) where it was specifically required that all persons be given equal and fair consideration "whether application is made through transfer procedures, on an acting basis, or, . . . as auxiliary principals." It is true that a reference was made in Circular No. 30 to the fact that "collective bargaining agreements may also contain provisions pertinent to the selection process", but it is perfectly consistent with the Preliminary Injunction (as well as the Final Judgment) that all parties preserve that part of the CSA transfer clause as permits both principals and assistant principals to apply freely in other districts, and even to receive in certain instances an interview, while voiding only that part of the transfer clause as purports to mandate that where five or more assistant principals apply under transfer no other candidate may even be considered.

The two Supplements to Circular No. 30, respectively dated January 4, 1973 and March 29, 1973, continue the appearance of indecision. The January Supplement states, "the transfer plan of the collective Bargaining Agreement currently in effect is applicable if the supervisory position is located in a school" (emphasis supplied). This was probably intended to cover the fact that the CSA contract otherwise expired on October 1, 1972. It need not have been intended to cause survival past such expiration date of any more of the transfer clause than was not inconsistent with the Preliminary Injunction. Paragraph (2) of the March Supplement, which stated that its purpose was "to ensure compliance with. . . policies and agreements", stated only that selection committee interviews might be limited to [no less than] ten candidates. Since the CSA transfer clause requires interview of up to nine transferring candidates for principal, it is probable that the intent of the March Supplement was to ensure compliance only with the interview portion of the transfer clause as it applied to principals. What is more, it reinforces the generally held understanding that in the case of assistant principals not five, but at least ten candidates must be interviewed.

Accordingly, it is respectfully submitted that even within the framework of City Board and Chancellor's regulations under the Preliminary Injunction there is not justification nor call for the newly appointed Executive Director of Personnel to issue his letter of October 26, 1973 purporting to restrict community school boards, at least as through November 1, 1973, to selection among the five senior transferring applicants for assistant principal where that number of transferees had applied.

-10-

Conclusion

For reasons inherent in the original decision in the Chance case, inherent and express in the Preliminary Injunction, and inherent and express in the Final Judgment; and for emergent, compelling and constitutional reasons affecting not only the original plaintiff class but also the respective classes represented by the Applicants and by the Presidents Council, which reasons are themselves wholly consistent with and in accordance with the fundamental reasoning of the decision in the Chance case, it is respectfully urged that this Honorable Court enjoin the City Board of Education and the respective community school boards, and the respective employees thereof, not to enforce that part of the CSA transfer clause, namely, Article VIII(B)(3), or any successor clause, which is inconsistent with the Preliminary Injunction and Final Judgment in said case.

Respectfully submitted,

FLEMMING & ZULACK

By

Joseph P. Flemming

cc: Leonard Bernikow, Esq.
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Elizabeth B. DuBois, Esq.
271 Madison Avenue
Suite 708
New York, New York 10016

Appendix to Submission
dated November 27, 1973

EUGENE MIRSKY Res. 31-50 140th Street, Flushing N.Y. 11354. File No. 321779. Lic. as Teacher of Common Branches. N.Y. State Certificate, Elementary School Principal. Teacher at P.S. 214Q 1961-72. Assigned as Assistant Principal, P.S. 214Q, February 1972.

DANIEL ANDRONOFSKY Res. 148-43 58th Avenue, Flushing, N.Y. File No. 160295. Lic. as Tea. of Com. Br. N.Y. State Certificate, Elem. Sch. Principal. Teacher at P.S. 191M, 1956-66. At P.S. 165Q, 1966-71. Assigned as Ass't Princ., P.S. 165Q, Oct. 1971.

ROBERT ROXENBERG Res. 2 Mara Road, Huntington Station, L.I. File No. 344399. Lic. as Tea. of Com. Br. N.Y. State Certificate, Elem. Sch. Principal. Tea. at P.S. 21Q, 1966-72. Assigned as Ass't Princ., P.S. 21Q, Feb. 1972.

HELEN S. KURZBAN Res. 79-14 266th Street, Floral Park, N.Y. 10044. File No. 311871. Lic. as Tea. Com. Br. N.Y. State Certificate, Supervision and Administration, Elementary School. Tea. at P.S. 107Q, 1966-70. Assigned as Ass't Princ., P.S. 107Q, Sept. 1970.

MURRAY BRAMAN Res. 34 Tottenham Place, New Hyde Park, N.Y. 11040. File No. 169222. Lic. as Tea. Com. Br. N.Y. State Certificate, Elem. Sch. Princ. Tea. at P.S. 54K, 1953-71. Acting Ass't Princ., P.S. 224K, 1961-62. Acting Ass't Princ., P.S. 54K, various periods, 1967-70. Tea. at P.S. 20Q, 1971-72. Assigned as Ass't Princ., P.S. 20Q, Feb. 1972.

PRESIDENTS COUNCIL



DISTRICT 25-QUEENS

November 24, 1973

Honorable Walter Mansfield
United States Circuit Judge
U. S. Court of Appeals for
the Second Circuit
Foley Square
New York, New York

Dear Sir:

On behalf of the President's Council of District 25, Queens, representing 31 elementary, intermediate and junior high schools, we would respectfully wish to draw to your attention our understanding that in your decision in the case of Chance v. Board of Examiners in 1971, all vacant positions in our schools would be made available to any and all candidates who would satisfy the educational and experience qualifications under State law and without regard to whether such persons held supervisory licenses, or regular appointments, or assignments. We make this representation to you on the understanding that the City Board of Education now takes the position that in the schools in our District where five or more licensed assistant principals presently serving elsewhere in New York City have applied for a vacancy the provisions in the Chance case and your most recent order in that case do not apply.

Our District is situated in that part of Queens which includes all or part of Flushing, Kew Gardens, College Point, Whitestone and Bayside. In our experience, under the present C.S.A. contract, it is almost always the case that five or more licensed assistant principals from other districts will apply for any vacancy in any of our schools under the so-called transfer clause of the C.S.A. contract. By this transfer clause, whenever such a number of licensed assistant principals applies for a vacancy, no other candidate may be considered for this position.

To the best of our belief this same situation commonly applies in certain other Queens and Brooklyn districts, in the Staten Island district and in certain Bronx districts.

The result of such a transfer policy is that in our District, for all practical purposes, we have no opportunity to recruit or even encourage capable personnel within our own District as well as elsewhere within the school system, or even outside the system, to become candidates for vacancies for assistant principals.

PRESIDENTS COUNCIL



DISTRICT 25-QUEENS

-2-

Other school districts may not be restricted in this fashion, but it is a very grievous and, in our sincere judgment, detrimental result both to our schools and to the personnel in our schools who have served ably and devotedly over the course of many years to be denied the opportunity to acquire the status of assistant principal in our own schools. Not only that, but it is a fact of life that personnel from our district who are therefore restricted from advancing in our district are frequently if not invariably at a handicap when they apply in a strange district.

Furthermore, in many cases during this interim period since the decision in the Chance case in 1971, persons from our school district have been serving faithfully in acting capacity as assistant principals who are now being advised by the City Board that by reason of the transfer policy under C.S.A. contract not only will they be displaced from their position but they will not even be eligible to apply for such position. This doubly hurts these particular schools in that experienced and qualified personnel will not even be permitted to put their credentials and service to the parents of the school and the community school board for possible selection on a permanent basis.

We had thought that the intention of the Chance decision was that hereafter each school and each school district would be given the opportunity to select its supervisors on a free and equal basis with all other schools and school districts, and that all capable candidates throughout the city would be eligible to place their names and credentials in nomination wherever they so chose. This is a position which the President's Council of District 25 is on record to approve.

We respectfully appeal to you to insure that in any order entered in the Chance case it be made clear that it will not discriminate against certain schools and certain school districts such as ours in the opportunity for us to select, and for applicants to apply, for supervisory positions, and for this reason we respectfully request you to overrule the transfer clause in the C.S.A. contract so far as it conflicts with this purpose.

Respectfully submitted,
Arlene Fleishman
Arlene Fleishman
Corres. Secy.

Dorothy Kay
President

cc: Peter Flemming, Esq.

Letter of Elizabeth B. DuBois, Esq., dated
November 27, 1973

LEGAL ACTION CENTER
OF THE CITY OF NEW YORK

271 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 679-6502

November 27, 1973

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The Honorable Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners

Dear Judge Mansfield:

After the conference in your chambers on Friday, November 16, plaintiffs' counsel had for the first time an opportunity to consider the relevance of the supplement to Circular #30 dated January 4, 1973. The existence of this supplement first came to our attention at that conference, as we then indicated.

Further consideration of the history and intent of the settlement and of the Court's Order of July 12, 1973, confirms our belief that that Order prohibits the Board of Education from requiring that vacancies be filled in accordance with the transfer provisions of the C.S.A. contract.

An essential fact which did not emerge at the conference is that the only paragraph in the Order which relates to the rights of unlicensed persons applying to vacancies is subpara. 2 of para. VIII. Para. III relates to the appointment of licensed persons (including, of course, persons licensed pursuant to the on-the-job performance evaluation system mandated by the Order). It is therefore the language of Para. VIII subpara. 2 which is key to the present dispute.

That language makes no reference to Circular 30, but states instead that the appointing authorities are empowered to select persons "who satisfy the eligibility requirements established by state law and by the Chancellor and the Board of Education of the City of New York, without regard to whether such persons presently hold regular appointments or assignments, supervisory licenses, or have passed supervisory examinations, or any portion thereof, administered in the past."

page two.

This language was taken from, and designed to provide the protections of, para. (4) of the Court's Preliminary Injunction, entered September 17, 1971. Under that preliminary injunction, defendants were specifically ordered to make all vacant supervisory positions available to such candidates. It was the clear intent of para. VIII, subpara. 2 of the final Order to continue this guarantee of access to all vacancies for persons who had not acquired licenses. There would have been no reason for plaintiffs to have agreed to a settlement which provided members of their class less protection than the preliminary injunction.

Plaintiffs submit further that the provisions of paras. III and VIII must be read in the light of the order as a whole, and its purpose. The order covers access to jobs. It was designed to bar preference for licensed personnel since licenses have been acquired in a manner challenged in the litigation as racially discriminatory and therefore unconstitutional.

The union transfer provisions clearly relate to and purport to limit access to jobs. They may well not affect the total number of available jobs, but they clearly do determine whether any particular group will have preference in seeking jobs and therefore whether any particular group will have an inside track in getting the best jobs. And they seek to give just such a preference to persons who have served for five years or more as assistant principals or in similar positions. As a representative of the Board of Education has conceded, all such persons were licensed and acquired their status through the discriminatory testing system challenged in this litigation. Therefore the union transfer provisions give a decided preference to a group of licensed personnel. In so doing they operate to the very substantial disadvantage of plaintiffs' class, which consists of persons who would have been or may become eligible for regular appointments "but for their failure to possess the licenses which have in the past been issued...."

In deciding whether the para. VIII provision barring preferences for licensed personnel extends to this special preference for one subgroup of licensed personnel, there is, admittedly, some possible conflict between para. VIII and the language in para. III C which makes reference to Special Circular #30. This conflict arises because of the January 4, 1973 supplement to Special Circular #30, brought to plaintiffs' attention at the November 16 conference, which indicates that transfer provisions of the collective bargaining agreement then in effect are to be applicable. It would be most unreasonable to read the settlement order as deferring to union transfer provisions because of this secondary reference to Circular #30. As noted previously this reference does not appear in para. VIII. Moreover

page three

para. III C on its face makes reference to Special Circular #30 only as a means of access to jobs and does not refer to any limitations on access which give preference to licensed personnel. The Special Circular itself contains no such preference. Indeed, the Special Circular contains a specific provision which on its face appears to prohibit use of the union transfer provisions to give priority to persons on the transfer lists. Thus para. III A(8) of Special Circular #30 provides:

"Equal and Fair Consideration. All persons interested in filling supervisory vacancies whether application is made through transfer procedures, on an acting basis, or, in the case of elementary principal vacancies, as auxiliary principals, shall be given equal and fair consideration by the screening and interviewing committees. In essence, the same procedures shall apply to all candidates for the purpose of fairness."

It was in order to incorporate this kind of provision, together with those relating to, e.g., eligibility standards, notice of vacancy, Parent Association participation, selection criteria, and written procedures, that reference to Circular #30 was made (See generally paras. III - IV of Circular #30), as well as for the purpose of defining "vacancy" (see footnote to para. III C, which refers to the attachment of Circular #30 as an exhibit). The January 4 supplement is not mentioned in para. III of the order. And as should be clear from the discussion in chambers last Friday, none of the parties to the settlement had focused on that supplement or had any idea that it had substantial significance in giving a preference to old line personnel. If so, there surely would have been some discussion of it because it is so out of keeping with the open access thrust of Special Circular #30, and with the apparent purpose of para. VIII of the Order. Under these circumstances, the January 4 supplement to Circular #30 cannot be read as incorporated in the Court's Order.

While the parties did not focus on and discuss the January 4 supplement to Special Circular #30, they clearly did discuss the union contract. There was general awareness that union contracts from time to time, including the current one, had provisions giving a preference to licensed personnel with respect to access to vacancies. It was specifically with this in mind that para. VIII was drawn to directly override any contrary provision in a "contract." While we did not discuss the union transfer provisions specifically, we did discuss the general subject of union contract provisions which operated to the disadvantage of acting personnel insofar as access to jobs was concerned, and we clearly decided to override all such provisions. Since the only aspect of the C.S.A. contract relating in any

page four

Date 10

way to the filling of vacancies are the transfer provisions (See Article VIII of the C.S.A. contract attached hereto as Exhibit A), the "contract" language of para. VIII of the Order makes no sense unless it is read to include reference to those provisions.

Mr. Cohen's statements in his letter of November 26, 1973, can not be accepted as an accurate representation of "the intentions of the parties in agreeing to the settlement." It was plaintiffs who insisted that the "or contract" language be added to the Order. And if Mr. Cohen was unaware of the existence of the transfer provisions at that time, I think he was the only participant in those negotiations who could have been. Certainly plaintiffs were aware of them, and certainly the members of the Board of Examiners who participated in virtually all the negotiating sessions and who have each had extensive experience in the New York City School System, must have been aware. Indeed we find it hard to reconcile Mr. Cohen's present position with that expressed in the telephone conversation he had with plaintiffs' counsel shortly after this controversy arose, confirmed in the letter to Ms. DuBois of October 22, attached hereto as Exhibit B (that letter was written in response to letters from plaintiffs' counsel which clearly set forth our interpretation of the Order, see Exhibit 2 to Ms. DuBois' letter to the Court of November 15, 1973).

If there is any doubt as to the import of the express language in para. VIII overriding contracts, a moment's reflection about the implications of the union transfer provision should make it clear that the purpose of the settlement order must have been to override the transfer preference. The whole purpose of the plaintiffs' action is to stop preferences for a primarily white group who acquired preferential status through discriminatory tests. The people on the union transfer lists are a hard core element of this group. The evidence in the case suggests that the tests were possibly more discriminatory five to ten years ago when these people acquired their licenses than they have been in recent years, and certainly no less discriminatory. It would have made no sense for plaintiffs to have agreed to a settlement which gave special preference to such a group. A preference for this group is so inconsistent with the overall goal and purpose of the settlement that it would necessarily have been expressly stated if the parties had intended that it occur.

In closing we should note the suggestion made at the November 16 conference by a representative of the Board of Education, Mr. Siegel, that the union transfer provisions might operate to the benefit of plaintiffs' class. Plaintiffs' counsel have no reason to believe that this is true. Counsel to the Board of

The Honorable Walter R. Mansfield
November 27, 1973

page five

Education provided us this date with information indicating that most transfers under the C.S.A. contract provisions are from predominantly minority school districts to racially mixed or predominantly white districts. This simply demonstrates that the effect of the union transfer policy is to perpetuate racial segregation of the school system as well as to lock members of plaintiffs' class out of jobs in the more desirable school districts. In any event, while plaintiffs remain amenable to discussing this issue with representatives of the Board of Education, it is irrelevant to the issue before the Court--that of the proper interpretation of the Order. If the Board of Education has reason to believe that plaintiffs' class's interests might be furthered by a modification of the Order, the Board should present that information to plaintiffs' counsel and the parties could, if appropriate, request a modification of the Order at some future time.

We respectfully urge the Court to issue an opinion clarifying any ambiguity that may exist as to the meaning of the Order and directing the Board of Education to take immediate action to remedy harm that has resulted to members of plaintiffs' class as a result of its official policy to date mandating that vacancies be filled in accordance with the union transfer provisions.

Sincerely,



Elizabeth B. DuBois
271 Madison Avenue
New York, New York 10016

George Cooper
435 West 116th Street
New York, New York 10027

Attorneys for Plaintiffs

EBDB:jl
Enclosures

cc: Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.

A G R E E M E N T
between
THE BOARD OF EDUCATION
of the
City of New York
and
COUNCIL OF SUPERVISORY ASSOCIATIONS
of the
Public Schools of New York City

October 1, 1969 - October 1, 1972

ARTICLE VIII

OPPORTUNITY FOR TRANSFER

Supervisors shall be given an opportunity for transfer from a school in one district to a school in another district in accordance with the following principles:

A. PRINCIPALS OF ELEMENTARY, INTERMEDIATE AND JUNIOR HIGH SCHOOLS:

1. To be eligible for transfer a principal shall have completed five years or more of continuous service in license in the school from which the transfer is sought.
2. The local school board and the district superintendent of the school to which the transfer is sought shall interview the nine eligible applicants with the highest seniority before considering those on existing eligible lists. Seniority is to be calculated on the basis of years of service under appointment in license, with each year in a special service school counting as one and one-half years.
3. Consent of the releasing district will not be required.

B. INTERMEDIATE SUPERVISORS IN ELEMENTARY, INTERMEDIATE, JUNIOR AND SENIOR HIGH SCHOOLS

1. To be eligible for transfer an intermediate supervisor in an elementary, intermediate, junior or senior high school shall have completed five or more years of continuous service in the license in the school from which the transfer is sought.
2. The five applicants with the greatest seniority will be interviewed by the receiving district or community superintendent, or the appropriate

assistant superintendent for high schools. Seniority is to be calculated on the basis of years of service under appointment in license, with each year in a special service school counting as one and one-half years.

3. If five or more eligible persons apply, the selection shall be made from among the five applicants with the greatest seniority. If fewer than five eligible persons apply, existing eligible lists may be utilized.
4. Consent of the releasing district will not be required.

C. PRINCIPALS OF HIGH SCHOOL

The parties will confer on a transfer plan for high school principals to be made effective as soon as practicable after the current reorganization of high school operations mandated by Chapter 330 of the Laws of 1969, is completed.

Administrative procedures for the effectuation of these provisions are to be formulated by the Board in consultation with the CSA.

ARTICLE IX

GRIEVANCE PROCEDURE

It is the declared objective of the parties to encourage the prompt and informal resolution of employee complaints as they arise and to provide recourse to orderly procedures for the satisfactory adjustment of complaints.

A. DEFINITION

1. The term "grievance" shall mean:
 - a. A complaint by a supervisor covered by this Agreement that there has been as to him a violation, misinterpretation or inequitable application of any of the provisions of this Agreement or of the Memorandum of Understanding between the Board and CSA dated September 10, 1968.

Exhibit B

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

ATTORNEYS

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October 22, 1973

Elizabeth B. DuBois, Esq.
271 Madison Avenue
Suite 708
New York, New York 10016

Re: Chance v. Board of Examiners

Dear Betsy:

I understand that Bud Cohen spoke with you by telephone on Wednesday, October 17, with regard to your letter jointly to Leonard Bernikow and him dated October 11.

The Final Judgment entered by Judge Mansfield on July 12, 1973 incorporates an interim system for the selection and licensing of supervisory personnel in the New York City School System. Paragraph VIII of that Judgment provides in part:

". . . nothing contained in this Judgment, or in any law, regulation, by-law, or contract, shall be deemed to require any such Community Board or the central Board to give priority to any one such group of persons as against another.

Accordingly, pending the implementation of a new selection system. . . , the appointing authority is authorized to fill vacancies either by the assignment of acting personnel, or by the appointment of licensed personnel. Nothing in this Judgment, or in any law, regulation, by-law, or contract, shall be deemed to require that vacancies be filled by licensed personnel." (Emphasis added)

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

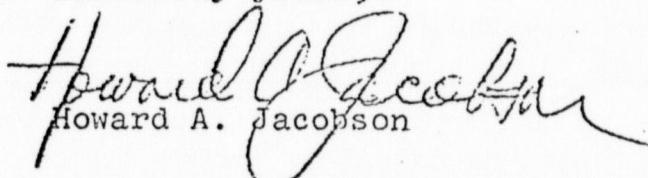
Elizabeth B. DuBois, Esq.

October 22, 1973

As Bud Cohen stated during your telephone conversation with him on October 17, we concur in the opinion expressed by you in your letters dated October 11, 1973 to Mr. Robert Roxenberg and to Ms. Ellen Peltonen that the word "contract" in paragraph VIII of the Final Judgment includes any collective bargaining agreement, whether with the C.S.A. or otherwise. Under the circumstances, we think the Final Judgment is clear and speaks for itself.

As Bud Cohen also told you during that telephone conversation, the Board of Examiners has no role whatever in connection with making appointments and, accordingly, neither the Board of Examiners nor any of its personnel give advice to any "appointing authority" or to anyone else with regard to making appointments. Moreover, Dr. Murray Rockowitz expressly denies ever stating to, or advising, any community school board or anyone else that the Final Judgment has a meaning other than as stated in this letter.

Sincerely yours,


Howard A. Jacobson

HAJ:ab

cc: Hon. Walter R. Mansfield
Leonard Bernikow, Esq.
Ms. Ellen Peltonen

Letter of Leonard Greenwald, Esq., dated
November 29, 1973

LAW OFFICES

FRANKLE & GREENWALD

-50a-

MAX H. FRANKLE
LEONARD GREENWALD

80 EIGHTH AVENUE, NEW YORK, N.Y. 10011

(212) 242-0200



November 29, 1973

The Hon. Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners

Dear Judge Mansfield:

Counsel for plaintiffs, in their letter of November 15, 1973, and in conference of November 16, 1973, have taken the position that transfer provisions relating to "Assistant to Principal" contained in the October 1, 1969, to October 1, 1972, collective bargaining agreement between the CSA and the Board of Education are in contempt of this Court's order of July 12, 1973.

Initially, I respectfully call the Court's attention to our November 26, 1973, letter.

I am attaching hereto copies of Article VIII (transfer) of the CSA collective agreement, October 1, 1969, to October 1, 1972. This agreement must be considered in context of the legal framework applicable at the time it was negotiated. The agreement was concluded before the current controversy arose.

CSA recognition by the Board of Education was limited to supervisors "serving under regular appointment in license." (Article I - Recognition)

Under the current collective agreement, recognition was extended to cover all ". . . supervisory employees in the titles covered

2--The Hon. Walter R. Mansfield, November 29, 1973

by . . ." the agreement. Based upon a showing of majority status, the CSA was accorded exclusive bargaining status as to "Acting" supervisors.

In addition, under the Education Law of the State of New York, the examination structure, appointment, and service in any supervisory position were based on license.

I must note, as I have previously noted, that licensure, in collective bargaining jargon, was simply an equivalent for time spent in service. As I noted, in special situations where educational problems abounded, credit for transfer was given at a formula ratio going beyond the bounds of license.

As indicated, a new collective bargaining agreement was concluded on or about August 1, 1973, and ratified overwhelmingly by the new CSA membership on or about August 20, 1973. That agreement is retroactive to October 1, 1972.

Major modifications in the transfer provisions were negotiated and are incorporated in the new collective bargaining agreement. The CSA negotiators, consisting in part of Acting supervisors, made significant contractual improvements, in their efforts to protect Acting supervisors. I have outlined some of these contractual protections previously.

As to transfer provisions, the current transfer provision eliminates completely any relation to license and simply uses time in "title" as a measuring standard. It was thus agreed by and between the CSA and the Board of Education that the time of service spent by an individual in a particular "title", i.e., Assistant Principal or Principal, would be counted towards his time in service, for transfer purposes. This would be so whether the time spent in service was as an Acting Assistant Principal or Acting Principal, or a licensed and appointed Assistant Principal or Principal. Under these contractual provisions, all supervisors are treated on the same basis.

There are additional provisions in the transfer provisions of the contract concerning break in assignment which we believe will be of major significance to the Acting person, in whose career a break in a break in assignment is more likely to occur.

3--The Hon. Walter R. Mansfield, November 29, 1973

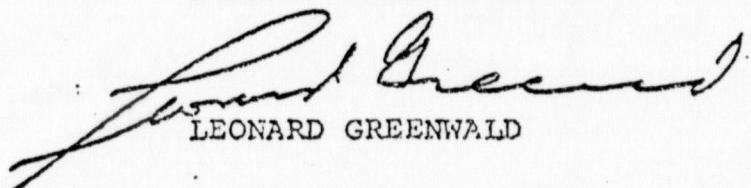
If the Court desires, we would present, for examination, members of the CSA negotiating team (including Acting personnel) who would detail both the motivations for and the results of the collective bargaining agreement.

It is particularly relevant at this point to note that the CSA had consistently urged upon the Board of Education in negotiations, and bargained for, a reduction of the time necessary to transfer from five years to a lesser period. Had we achieved our demand in collective bargaining, Acting personnel appointed pursuant to Circular 30 would have been eligible for transfer before the termination of this agreement.

The Board of Education, in constant communication and consultation with the community boards, rejected our proposals. We were led to understand that it was the almost unanimous consensus of the community boards that Assistant Principals with less than five years' experience were highly undesirable. Indeed, there were discussions during negotiations in which the Board sought to raise the service threshold from five to ten or twelve years. The rationale for this was that Assistant Principals, lacking intensive supervisory training, were educationally inexperienced even with five years of service.

I am attaching hereto a copy of the relevant transfer provisions contained in the current collective bargaining agreement. As of this date, the agreement has not been printed, and I am submitting what I understand to be a copy of the final draft.

Respectfully submitted,



LEONARD GREENWALD

LG:bsw
enclosures
cc: Elizabeth B. DuBois, Esq.,
Saul Z. Cohen, Esq.,
Leonard Bernikow, Esq.

Letter of Leonard Bernikow, Esq., dated
December 3, 1973



LAW DEPARTMENT
MUNICIPAL BUILDING, NEW YORK, N.Y. 10007

NORMAN REDLICH, Corporation Counsel

RECORDED
DEC 20 1973
FILED

December 3, 1973

The Honorable Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners

Dear Judge Mansfield:

This letter is in reply to the letter of Elizabeth Du Bois dated November 27, 1973.

We take strong exception to the interpretation placed on paragraph VIII in the court's order of July 12, 1973 as contained in the aforesaid letter. As we pointed out in our letter to your Honor, dated November 16, 1973, the first sub-paragraph of paragraph VIII precludes the contract from requiring a community board or the central Board to give priority to any such group of persons as against another. The word "such" refers back to those persons who are licensed in accordance with paragraph III of the court's order. The second paragraph simply expands on that concept to provide for procedures "pending implementation of a new selection system." The word "accordingly" clearly indicates that it is intended to refer to the preceding paragraph.

The quotation contained in the last paragraph of the first page of Ms. Du Bois' letter is relevant to the issue before us. That quotation refers solely "to the assignment of acting personnel" during the interim period. The issue now before the court does not involve "acting assignments". The transfer of a tenured employee does not create an acting assignment. There would have been no need to refer to Circular 30 in this paragraph of the order (para. VIII). Circular 30 governs the assignment of acting personnel by virtue of the previous provisions of the order. Also it should be noted that

Judge Mansfield

-2-

December 3, 1973

plaintiff refers to the supplement to Circular 30 dated January 4, 1973 as though it were the only reference to the collective bargaining agreement in the Circular. In fact, the original issue of Circular 30 also referred to the "collective bargaining agreements" being "pertinent to the selection process." Indeed this appears in the opening paragraph of the Circular and nobody can misunderstand it. The January supplement to Circular 30 simply continued a practice that had been in effect during the period of the temporary injunction and was issued to clarify the fact that Article VIII of the collective bargaining agreement continued in effect pending renegotiation of the new agreement.

As we stressed in chambers on November 16, 1973, the term "license" standing by itself is not relevant to this current dispute. Throughout her letter plaintiffs' counsel refers to "licensed" persons to build her case. We have already indicated in our previous letter that the "licensed" persons referred to in the order are those described in paragraph III. If plaintiffs' counsel is suggesting that such licensed person may not be granted preferences, we agree. However, nowhere in her letter does she deal with the rights accrued to persons who were both licensed and appointed long before the institution of this suit. It is obvious that appointment after license and the attainment of tenure changes the status of school employees. This status was neither considered in the main complaint nor in either of the orders issued by this court. License confers no status or rights to appointment. At most, it is a pre-condition to appointment.

We recognize that paragraph VIII does refer to contracts. We assumed and still assume that the purpose of adding the term "contract" was to preclude the possibility that the then current contract or any subsequent contract might alter any of the conditions for granting of licenses that might be possible within the terms of the State Education Law. Mr. Cohen's November 26 letter lends support to this assumption. Indeed, it seems unlikely that in a stipulation that was as detailed, and as arduously arrived at, as the Stipulation which formed the basis of the court's order, that no reference would have been made to a matter of such importance as the "transfer plan" which governed current practice and was a matter of public record.

December 3, 1973

-5a-

In Chambers on November 16 your Honor had indicated an interest in the number of instances in which the transfer plan was used. I have been informed that for the period of time starting September 1, 1972 through September 30, 1973 there were approximately 550 appointments of acting assistant principals. Out of this number, 27 were transfers under the provisions of the CSA Agreement. It should be pointed out that since most transfers are effectuated on September 1, this period would cover most of the transfers for two school years.

Collective bargaining agreements covering public employees in New York State deal with the terms and conditions of employment, commonly described as working conditions. Many of these working conditions are dependent upon length of service such as wage provisions, death benefits, sabbatical leave, vested retirement rights, disability retirement rights and sick leaves. The transfer plan under the CSA agreement is also a condition dependent upon length of service. The thrust of the plaintiffs' suit and the court's orders deal with the procedures whereby employees are licensed and thereafter obtain a job. They do not deal with the conditions of work after they are on the job. We therefore do not and could not assume that either the court or the parties intended to impair contractual obligations with respect to the terms and conditions of employment.

Respectfully yours,

Leonard Bernikow
Assistant Corporation Counsel

cc: Elizabeth DuBois, Esq.
Saul Z. Cohen, Esq.

Letter of Leonard Greenwald, Esq., dated
December 28, 1973

LAW OFFICES
FRANKLE & GREENWALD

MAX H FRANKLE
LEONARD GREENWALD

80 EIGHTH AVENUE, NEW YORK, N.Y. 10011

(212) 242-0200

December 23, 1973

Hon. Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance et al. v. Board of Education

Dear Judge Mansfield:

In accordance with the understanding reached in conference on November 16, 1973, this office submitted, on behalf of the CSA, certain statements of position by letters dated November 26 and November 29, 1973. Copies of these letters were sent to counsel for all parties. Regrettably, counsel for the other parties did not see fit to mail us copies of their correspondence with the Court.

On or about December 15, 1973, we discovered that copies of Ms DuBois' letter of November 27, 1973, to the Court were receiving wide circulation among individuals and groups, notably, the Public Education Association. It is our opinion that the letter was circulated for the purpose of forestalling adoption of the pending collective bargaining agreement by the Board of Education. This ploy nevertheless was rejected, and the collective bargaining agreement between the CSA and the Board of Education for the period October 1, 1972, to October 1, 1975, was adopted unanimously by the Board of Education.

We regard this use of Ms DuBois' letter as both extraordinary and unfortunate.

On pages 4 and 5 of Ms DuBois' letter, she urges the Court to accept the unproven and unsupportable contention that the

2--Hon. Walter R. Mansfield, December 28, 1973

transfer plan perpetuates racial segregation. Ms DuBois' statement is an outrage and an abuse of advocacy.

We respectfully submit that it demonstrates conclusively that the aim of the plaintiffs is not to improve the educational and supervisory posture of our school system but to level and destroy it.

The 4,500 members of the CSA, approximately one-third of whom are either black or Spanish speaking, express their total opposition to the concept of equality advocated by plaintiffs.

We have previously noted that we believe plaintiffs were acting in the interest of only a few individuals. If plaintiffs had their way, the 1,000 acting assistant principals or principals (minority group members) would have been functioning without due process or earned income.

I must vigorously note our exception to the tone and remarks of plaintiffs' counsel and respectfully request again that the CSA be permitted to intervene and that the Court convene an evidentiary hearing for all purposes.

Respectfully,

LEONARD GREENWALD

LG:bsw

cc: Leonard Bernikow, Esq.
Elizabeth DuBois, Esq.
Saul Z. Cohen, Esq.

Order (Tyler, D.J.) filed on January 21, 1974

COURT ORDER GRANTING CSA LIMITED INTERVENTION, Jan. 21, 1974

January 21, 1974

Motion granted for intervention of petitioner CSA, local, etc., pursuant to Rule 24, F.R. Civ. P., and subject to the limitations expressed in the last paragraph of the opinion of this Court (per Mansfield, J.) dated on or about December 27, 1973.

It is so ordered.

H.R. Tyler, J.
U.S.D.J.

Letter of Joseph P. Flemming, Esq., dated
February 4, 1974

LAW OFFICES

FLEMMING & ZULACK
40 WALL STREET
NEW YORK, N.Y. 10005

JOSEPH P. FLEMMING
JOHN F. ZULACK

TELEPHONE (212) 957-0915

CABLES "EGALITE"
TELEX 232123

February 4, 1974

Hon. Harold R. Tyler
U.S. District Judge
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Sir:

Application is respectfully made on behalf of Eugene Mirsky, Daniel Adronofsky, Robert Roxenberg, Helen S. Kurzban and Murray Braman (the "Applicants") for leave to file the enclosed Memorandum opposing the current application of the Council of Supervisors and Administrators ("CSA") for reargument of the Opinion and order herein of Judge Mansfield of December 27, 1973 (the "Transfer Opinion"). While Applicants do not here argue as such that they may be entitled to intervene under FRCP 24(a)(2), or that, so intervening, they might be entitled to status as a class for purposes of FRCP 23(a), as the state of the current proceeding would not seem to merit extended argument as to such issue at this time, Applicants respectfully reserve their right to do so under different circumstances.

Suffice it to say that for reasons set forth below, Applicants request permission to file their Memorandum and to take part in any other or further argumentation regarding the Transfer Opinion, as amici curiae.

The Applicants are each licensed teachers in the City School System who are presently performing the duties of assistant principals in elementary schools in Community School District 25, Queens. Each has applied

Hon. Harold R. Tyler

-2-

for and hopes to serve permanently in such position. Previous to the Transfer Opinion herein each had been advised that his or her application could not be considered for the reason that the requisite minimum number of licensed assistant principals had applied for position under the CSA transfer clause. Each has State Certification for his position and believes him or herself otherwise also to be eligible for such position.

In addition, the Applicants understand and believe that there are numerous other persons having State Certification and the other requisites for assignment as assistant principal, whose names are unknown to them, who are similarly situated to the Applicants in that they are employed in District 25 or other districts similarly situated and in that they have applied or in the future will apply either for the identical vacancies in District 25 for which the Applicants have applied or for other vacancies present or future in District 25 or such other districts similarly situated.

It is not unlikely that many of the original plaintiffs' class were and are in fact also members of the Applicants' class by reason of the situs of employment in the Applicants' own or similarly situated school districts or by reason of possession of those particular professional skills and attributes more likely to be successful in such districts than elsewhere, and so would have been as equally disadvantaged as the Applicants as to making application for and being accepted for employment as assistant principals in such districts, where their professional experience and skills might presumptively have been best suited, had the transfer clause of the CSA contracts been permitted to continue.

Prior to what has become the "Mansfield Decision" (330 F.Supp. 203) it was necessary in New York City to acquire a license from the Board of Examiners before it was possible to receive either an appointment or, except for assignments of less than six months, an assignment to a supervisory vacancy. As from the issuance of the Preliminary

Hon. Harold R. Tyler

-3-

Injunction herein in September 1971, it was no longer necessary to have a license to be assigned to a supervisory position. As from the entry of the Final Judgment in July 1973, it appears that, except for previously existing licenses or licenses derived from previously taken examinations, and pending an eventual permanent system of licensing still to be developed, it is necessary to be assigned to a supervisory position before it is possible to have the opportunity to acquire a license. Aspiring supervisors may acquire supervisory licenses only through the process of being accepted as a candidate for an existing vacancy and being further qualified by observation of his performance. If the CSA transfer clause had been permitted to be applied with respect to assistant principals (which is, of course, the "entry point" for most supervisors), existing experience indicates that most vacancies that would occur in such districts as District 25 would have been compulsorily filled by transferees.

The Applicants would, but for the Transfer Opinion in this case, have been caught between the sword of the CSA transfer clause and the anvil of the Final Judgment herein. That is, should the CSA transfer clause have been permitted to apply, this class would have had no opportunity for employment, and therefore to acquire license, except upon application as candidates for vacancies in districts far from their own, both in geography and in entirely legitimate but often quite different criteria. Thus there would have been placed upon this class an inordinate burden which on a statistical basis would certainly and immediately result in a severe and unjustified deprivation of opportunity for professional advancement.

For the foregoing reasons, the Applicants respectfully submit that theirs is sufficient and compelling interest in the particular issue of the Transfer Opinion as to warrant acceptance of their Memorandum in opposition to the CSA application for reargument.

Respectfully yours,

FLEMMING & ZULACK

By
Joseph P. Flemming

cc: (See next page)

Hon. Harold R. Tyler

-4-

Elizabeth B. DuBois, Esq.
Attorney for Plaintiffs
271 Madison Avenue
New York, New York 10016

Kaye, Scholer, Fierman,
Hays & Handler, Esqs.
Attorneys for Defendant Board of Examiners
425 Park Avenue
New York, New York 10022

Adrian Burke, Esq.
Corporation Counsel
Attorney for Defendant Board of Education
Att: Leonard Bernikow, Esq.
Municipal Building
New York, New York 10007

Frankle & Greenwald, Esqs.
Att: Leonard Greenwald, Esq.
Attorneys for Council of Supervisors
& Administrators
80 Eighth Avenue
New York, New York 10011

Letter of Leonard Greenwald, Esq., dated
February 8, 1974

February 8, 1974

Hon. Harold R. Tyler, Jr.
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

To: Chenow et al. vs Board of Education et al.
79 Civ 4161

Dear Judge Tyler:

I am objecting to the request made on behalf of Messrs. Mizsky et al., seeking permission to file a memorandum and take part in any proceeding involving the transfer issue presented in the above matter.

Frankly, the request of Messrs. Mizsky et al. vividly illustrates a position of the CSA presented to Judge Mansfield at his November conference.

At that conference plaintiffs' counsel took the position that the transfer agreement would upgrade movement of supervisors (minority supervisors) into non-minority school districts. I advised the Court that this was not correct and that in reality meaningful transfer of minority group supervisors could only be accomplished through a mandated contractual provision.

Messrs. Mizsky et al. are non-minority supervisors who are apparently occupying intermediate supervisor positions in their respective schools. As those schools are located within Community Board 25 Queens, a number of applicants have sought transfer to these positions. An individual who is serving in a school in which a vacancy occurs possesses a number of advantages that cannot be readily overcome by an individual

2--Hon. Harold R. Tyler, Jr., February 8, 1974

seeking voluntary placement there. The incumbent is not only known to the school, its staff, and the parent association but can, under some circumstances, with the cooperation of others, easily conceal any vacancy. Thus, the only real way any mobility between districts can be achieved is through a contractual provision regulating such transfers. The community board can overcome local parent and staff resistance when it contends that a transfer is required by the contract. Any other source of discontent can be removed when the parents are shown that the transferee possesses a record of satisfactory service. The CEA urged during negotiations that transfer provisions were necessary in order to achieve a balanced and open school system.

Moskow, Mirsky et al's contentions in their brief regarding the application of the transfer provisions are wrong. There is no prohibition concerning transfers other than the accumulation of service. As indicated in the correspondence of both the CEA and the Board of Education, leaving supervisors will be eligible for transfer during the next school year.

Respectfully yours,

LAWRENCE GREENBAUM

LGL:bw

cc: Saul Z. Cohen, Esq.
Leonard Bernikow, Esq.
Elizabeth DuBois, Esq.
Joseph P. Flannigan, Esq.

Opinion (Tyler, D.J.) filed on February 25, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

BOSTON M CHANCE, LOUIS C.
MERCADO, et al.,

Plaintiffs,

S.D. OF N.Y.

FEB 26 1 33 PM '74
FILED
U.S. DISTRICT COURT
S.D. OF N.Y.

FF 40395
MEMORANDUM

-against-

70 Civ. 4141 HRT

THE BOARD OF EXAMINERS and
THE BOARD OF EDUCATION OF THE
CITY OF NEW YORK, et al.,

Defendants.

-----X

TYLER, D.J.

The Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO ("CSA") moved for intervention on January 21, 1974, pursuant to an Order to Show Cause signed by this court on January 8, 1974. Additionally, the CSA urged this court to reconsider Judge Mansfield's decision of December 27, 1973, in which the court held that the transfer provisions of the CSA agreement were inconsistent with

the orders of the court and barred the Board of Education from implementing those provisions. In the same opinion, the court allowed CSA the right to intervene, at least informally, "for the limited purpose of contesting the issue raised by plaintiffs with respect to the transfer provisions of the CSA agreement."

At the hearing of CSA's formal motion, this court, per the undersigned, granted CSA the right to intervene for the aforesaid limited purpose. Furthermore, reargument was granted in effect, and this court has heard counsel and considered not only the written submissions of CSA but of the parties as well.

Having granted CSA's limited intervention and heard reargument, I conclude that the interim prohibition against the implementation of the CSA transfer provisions received full consideration before Judge Mansfield. I concur in his observation that to allow the implementation of the transfer provisions would perpetuate discrimination and seriously jeopardize the efficacy of previous orders of the court.

Accordingly, this court declines to rescind or alter the decision of Judge Mansfield of December 27, 1973. It is so ordered.

Dated: February 25, 1974

N. R. Taylor Jr.
U.S.D.J.

Order (Tyler, D.J.) filed on March 12, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C.
MERCADO, et al.,

ORDER

Plaintiffs,

-against-

70 Civil 4141
H. R. T.

THE BOARD OF EXAMINERS and THE
BOARD OF EDUCATION OF THE CITY OF
NEW YORK, et al.,

Defendants.

This cause came on to be heard on motion of Intervenor, COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO, for a stay pending Intervenor's appeal to the United States Court of Appeals for the Second Circuit, and after hearing counsel for all parties on March 12, 1974, and it appearing to the court that the Intervenor is not entitled to such a stay, it is

ORDERED, that the motion of Intervenor, COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK LOCAL 1, SASOC, AFL-CIO, is hereby denied. *for intervention*

Dated: March 12, 1974.

The following reasons:

E N T E R

1. I have examined plaintiff's brief, the order, or questions or suggestions as to a general order;

2. Similarly assuming that this is an interlocutory order, it does not seem to be appealable under 28 U.S.C. 1291.

each considered CSII's arguments at length,
thus, unlikely that appeal of this narrow
side issue will do any more than delay
resolution of the case in due course.

-68a-

(cont'd.)

4. At present, it appears more than likely
that the entire litigation may soon be
concluded at the District Court level; and
5. The order which CSII challenges has been
in effect since December 27, 1973; hence
there seems to be no compelling urgency
for this appeal if such legally as
promised, to go forward.

Dated: March 12 1974

Harold P. Tyler, Jr.
U.S.D.J.

Order (United States Court of Appeals (Second Circuit) filed on
March 18, 1974

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of March, one thousand nine hundred and seventy-four.

Boston M. Chance, Louis C. Mercado,
et al.,

Plaintiffs

v.

The Board of Examiners and the Board
of Education of the City of New York,
et al.,

Defendants.

It is hereby ordered that the motion made herein by counsel for the

Council for Supervisors and Administrators, et al.
appellant / ~~Opposed~~ ~~Opposed~~ ~~Opposed~~

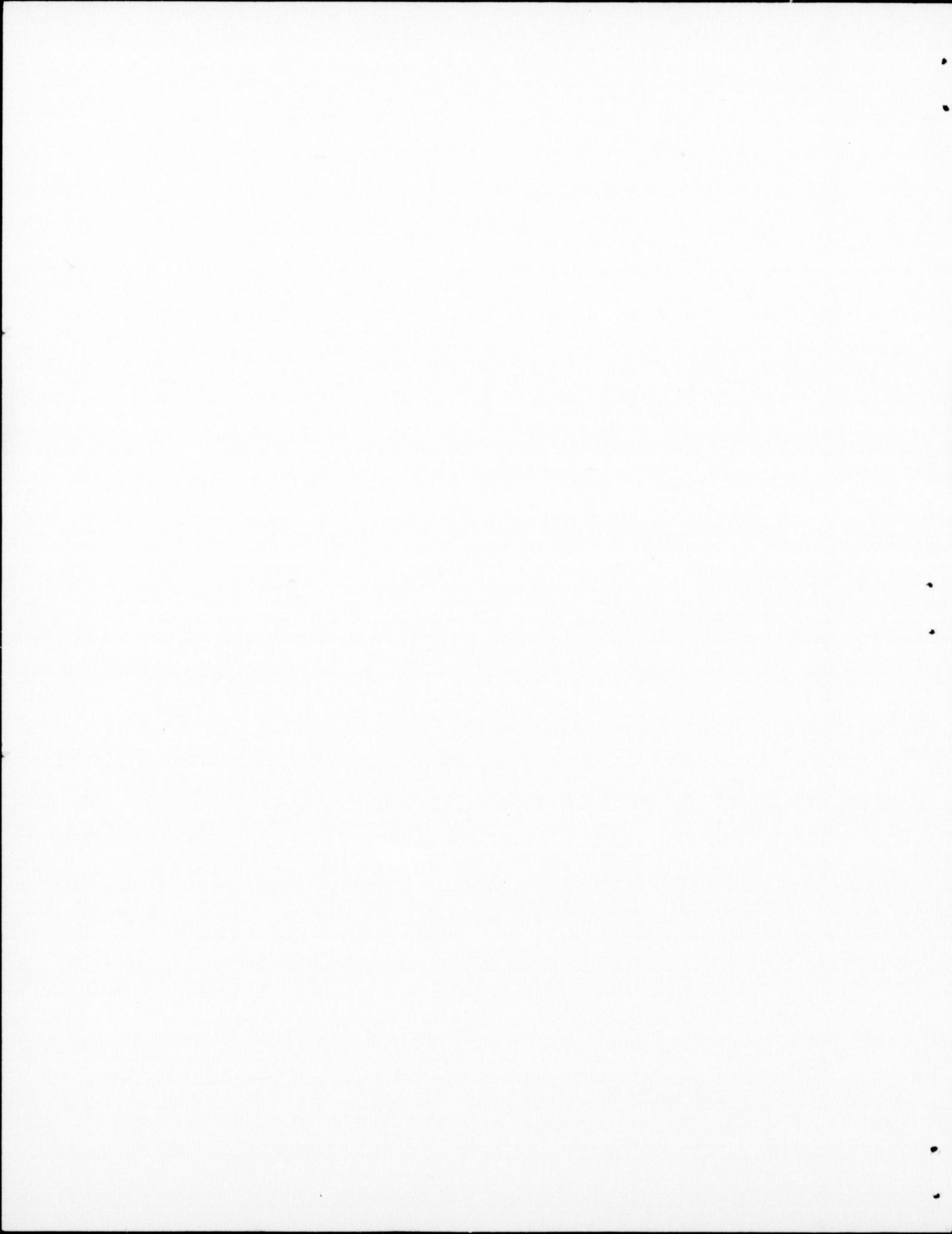
by notice of motion dated for a stay pending determination of the appeal

be and it hereby is granted denied without prejudice.

It is further ordered that appellants shall file any briefs in addition to those filed on this motion and a joint appendix on or before April 1, 1974; appellee shall file their briefs on or before May 1, 1974 and the appeal shall be set for argument during the week of May 6, 1974.

A. DANIEL FUSARO
Clerk

By Edward J. Guardaro
Senior Deputy Clerk



* * *

BEFORE: HON. J. EDWARD LUMARD
HON. WILFRED FEINBERG
HON. WILLIAM H. MULLIGAN
Circuit Judges